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No. 07-619

IN THE

Supreme Court of the United States

PT PERTAMINA (PERSERO), f/k/a PERUSAHAAN PERTAMBANGAN MINYAK DAN GAS BUMI NEGARA,

Petitioner,

v.

KARAHA BODAS COMPANY, L.L.C.

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether an anti-suit injunction, upheld by the United States Court of Appeals for the Second Circuit using the most restrictive standard available, was justified under that approach.

2. Whether a litigant who obstructs the important public policies of prompt enforcement of international arbitration awards and finality of litigation may be enjoined from continuing to do so.

3. Whether a federal district court has continuing "ancillary" subject matter jurisdiction to protect and effectuate its own and other federal courts' judgments.

STATEMENT PURSUANT TO RULE 29.6

Respondent Karaha Bodas Company, L.L.C. certifies that its ultimate corporate parents are FPL Group, Inc., Caithness Energy, L.L.C., and P.T. Sumarah Dayasakti. Ten percent or more of the stock of Karaha Bodas Company, L.L.C. is indirectly owned by FPL Group, Inc., a publicly held company traded on the New York Stock Exchange.

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INTRODUCTION

Respondent Karaha Bodas Company, L.L.C. ("KBC") respectfully submits this brief in opposition to the Petition for a Writ of Certiorari (the "Petition") filed on November 8, 2007, by Petitioner PT Pertamina (Persero) (f/k/a Perusahaan Pertambangan Minyak Dan Gas Bumi Negara) ("Pertamina"). For all the reasons that follow, KBC respectfully submits that the decision of the United States Court of Appeals for the Second Circuit was correct in all respects, that there are no compelling reasons justifying a grant of certiorari by this Court, and that the Petition should be denied in its entirety.

COUNTER-STATEMENT OF THE CASE

Pertamina's three prior attempts to bring this straightforward commercial dispute before this Court have all been rejected.[1] This fourth Petition for

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[1] *See Perusahaan Pertambangan Minyak Dan Gas Bumi Negara v. Karaha Bodas Co., L.L.C.*, 539 U.S. 904, 123 S. Ct. 2256, 156 L. Ed. 2d 113 (2003) (denying Pertamina's petition for writ of certiorari to the U.S. Court of Appeals for the Second Circuit); *PT Pertamina (Persero) v. Karaha Bodas Co., L.L.C.*, 543 U.S. 917, 125 S. Ct. 59, 160 L. Ed. 2d 202 (2004) (denying Pertamina's petition for writ of certiorari to the U.S. Court of Appeals for the Fifth Circuit); *PT Pertamina (Persero) v. Karaha Bodas Co., L.L.C.*, 127 S. Ct. 129, 166 L. Ed. 2d 35 (2006) (denying Pertamina's petition for writ of certiorari to the U.S. Court of Appeals for the Second Circuit). On February 14, 2007, this Court also denied Pertamina's emergency application requesting a stay of the disbursement injunction lifted

(continued...)

certiorari concerns Pertamina's improper attempt to use the courts of the Cayman Islands to nullify the arbitration award issued to KBC in 2000, as well as the final judgments of the United States District Court for the Southern District of Texas (the "Texas District Court") and the United States Court of Appeals for the Fifth Circuit (the "Fifth Circuit") confirming the award, and the final judgments of the United States District Court for the Southern District of New York (the "New York District Court") and the United States Court of Appeals for the Second Circuit (the "Second Circuit") enforcing that award.

On December 18, 2000, a Swiss Arbitral Tribunal issued its final decision awarding KBC $261,166,654.92 (the "Award"). Pertamina refused to pay the Award, forcing KBC to commence confirmation and enforcement proceedings in the United States and abroad.[2] On December 4, 2001, the Texas District

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(...continued)

the previous day by the U.S. Court of Appeals for the Second Circuit.

[2] Pertamina's Petition states repeatedly that the Texas District Court's Judgment on the Award was "paid." It is important to note that Pertamina never voluntarily "paid" the award or resulting judgments. To the contrary, those judgments were satisfied only by virtue of the New York District Court's orders mandating a third party garnishee – Bank of America, which handles Pertamina's oil and gas revenues – pay the judgment funds to KBC. These orders were preceded by years of contentious litigation and resistance by both Pertamina and the Indonesian Ministry of Finance.

Court confirmed the Award and entered judgment in favor of KBC (the "Texas Judgment"). On October 22, 2004, the New York District Court issued a final judgment turning over to KBC the full amount of the Texas Judgment. The Second Circuit summarily affirmed the New York District Court's October 2004 judgment in March 2006. On September 15, 2006, just days before this Court denied Pertamina's third petition for certiorari – a decision that would have resulted in the final distribution of the funds to KBC and that should have ended this litigation[3] – Pertamina brought an entirely new lawsuit against KBC in the Cayman Islands (the "Cayman Action"). The Cayman Action sought, on the basis of a belated and meritless claim for "fraud," (a) to "vitiate" the Award that the Texas District Court confirmed and that the New York District Court enforced, and (b) to enjoin KBC from using the Texas Judgment funds or distributing them to its stakeholders. The New York District Court properly viewed Pertamina's tactics as a direct threat to its jurisdiction and prior judgments (as well as to the finality of the Award and the Texas Judgment, which was registered in the New York District Court pursuant to 28 U.S.C. § 1963 at the outset of the enforcement proceedings). Consequently, on December 19, 2006, the New York District Court issued an order

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[3] The New York District Court's turnover order was stayed pending adjudication of all appeals, so that no funds were actually turned over to KBC until this Court had denied Pertamina's and the Indonesian Government's respective petitions for certiorari in October 2006.

enjoining Pertamina from prosecuting the Cayman Action and from commencing new litigation in order to frustrate KBC's use of the Award proceeds and trap KBC in perpetual litigation. Importantly, the order also expressly protected Pertamina's right to freely litigate its "fraud" defense in those courts that were already involved in this matter. That anti-suit injunction was upheld, with modifications, by the Second Circuit. The modified order of the Second Circuit was correct in enjoining Pertamina from continuing its perpetual litigation and should be left undisturbed.[4]

COUNTER-STATEMENT OF THE FACTS

Pertamina's intransigence has caused this straightforward case to take on a long and complicated procedural history. The anti-suit injunction on appeal represents the culmination of over nine years of

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[4] Recent events illustrate that Pertamina has no intention of discontinuing its campaign to "vitiate" the judgment against it. On November 6, 2007 – two days prior to filing this fourth petition for certiorari in this matter – Pertamina's chief executive officer, Ari Seomamo, stated that Pertamina "*will fight to the end, we will fight until the last drop of our blood.*" *See* "Pertamina to Appeal Karaha Case in U.S. Court – Officials" Reuters, Nov. 6, 2007 (emphasis added) (Resp't App. 2a). This approach characterizes Pertamina's litigation conduct around the world, prolonging a straightforward commercial dispute into a nine-year procedural battle conducted in seven different countries. Courts around the world have uniformly condemned Pertamina's litigation misconduct. *See* Declaration of James E. Berger, Dec. 10, 2007 (Resp't App. 4a) (quoting myriad judicial rebukes).

arbitration and litigation in the United States and six other nations.

I. THE PRIOR PROCEEDINGS

A. The Project and the Arbitration

In 1994, KBC agreed with Pertamina to develop the Karaha Bodas geothermal energy project (the "Project") in West Java, Indonesia. On January 10, 1998, the President of Indonesia issued a decree that effectively terminated the Project. The Project's premature termination caused KBC to suffer substantial losses, and KBC accordingly initiated arbitration seeking damages of over $600 million for its lost investment and lost profits. *See Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 465 F. Supp. 2d 283, 285 (S.D.N.Y. 2006), *aff'd as modified by* 500 F.3d 111 (2d Cir. 2007). One of the most closely-contested issues during the arbitration was the size of the geothermal resource that KBC sought to develop. Pertamina argued that the geothermal yield of the Project was much lower than KBC claimed, and Pertamina cross-examined KBC's witnesses and questioned the geothermal analyses KBC had prepared. Most notably, Pertamina expressly alleged that the principal documents prepared by KBC describing the size of the geothermal resource were "sham[s]."[5] The Arbitral Tribunal considered and

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[5] Pertamina claims in its Petition that it "did not assert [in the Texas District Court proceedings] (because it did not then have (continued...)

rejected Pertamina's fraud allegations,[6] but agreed that the size of the resource may have been overestimated. *See Karaha Bodas Co.*, 500 F.3d at 113-14. Thus, while the Tribunal found that KBC's geothermal projections were genuine, it nonetheless ruled largely in Pertamina's favor on the issue of the size of the resources and reduced the amount of KBC's lost profits recovery by $350 million. *See id.* On December 18, 2000, the Arbitral Tribunal issued its final decision awarding KBC $261.1 million. *See Karaha Bodas Co.*, 465 F. Supp. 2d at 284.

B. The Confirmation and Annulment Proceedings

Pertamina has at all times adamantly refused to pay the Award, forcing KBC to commence confirmation and

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proof) that KBC's Notices had fraudulently misrepresented the extent of geothermal resource that KBC had confirmed." Petr. Brief at 6. That claim is demonstrably false. By its own admission, Pertamina had the documents it now touts as "proof" of KBC's alleged fraud at the time it moved in the Texas District Court for relief from the Texas Judgment under Fed.R.Civ.P. 60(b).

[6] The Second Circuit expressly found that Pertamina's fraud allegations were litigated before the Arbitral Tribunal and taken into consideration in determining the amount of the Award. *See Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 500 F.3d 111, 113-14 (2d Cir. 2007) ("The Swiss arbitral tribunal rejected Pertamina's allegations 'about the genuineness' of the information provided by KBC in support of its claims, but acknowledged the possibility that KBC's projections may have been 'overestimate[s].'")

enforcement proceedings in the United States, Hong Kong, Singapore, and Canada. The courts of each of those nations have confirmed the Award. In the United States, the Texas District Court confirmed the Award and entered judgment on December 4, 2001. The Texas Judgment was affirmed by the Fifth Circuit, whose order affirming the Texas Judgment this Court declined to review.[7] In addition to vigorously opposing KBC's attempts to confirm the Award, Pertamina commenced annulment actions in the courts of Switzerland and Indonesia. Following the Swiss Supreme Court's dismissal of Pertamina's first annulment petition, Pertamina commenced a second annulment action in the courts of Indonesia, which was ultimately dismissed.[8]

In response to Pertamina's Indonesian annulment action, KBC sought and was granted an anti-suit injunction by the Texas District Court to prevent Pertamina from prosecuting the annulment action.[9] On June 18, 2003, the Fifth Circuit vacated the Texas District Court's injunction on the ground that notions of international comity overrode any potential burdens

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[7] *See Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 190 F. Supp. 2d 936 (S.D. Tex. 2001), *aff 'd*, 364 F.3d 274 (5th Cir.), *cert. denied*, 543 U.S. 917 (2004).

[8] *See Karaha Bodas Co.*, 500 F.3d at 114-15.

[9] In March 2004, the Indonesian Supreme Court vacated the Indonesian trial court's order annulling the Award. *See Karaha Bodas Co.*, 500 F.3d at 115.

arising from the Indonesian litigation. *See Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara,* 335 F.3d 357, 375-76 (5th Cir. 2003). Despite finding that "Pertamina is likely in the wrong here, and that Indonesia's injunction and annulment may violate comity and the spirit of the [New York] Convention much more than would the district court's injunction," the Fifth Circuit held that because the Indonesian annulment action posed no threat to the Texas District Court's Judgment, international comity weighed in favor of allowing Pertamina to prosecute its Indonesian action.[10] *Id.* at 373. Despite finding in Pertamina's favor, the Fifth Circuit's decision was harshly critical of Pertamina, stating: "Although it is always possible for Pertamina to pursue enforcement . . . in third countries, it seems extremely unlikely that any country would countenance

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[10] While Pertamina alleges a circuit split arising in this same case based on the fact that the Fifth Circuit reversed the Texas District Court's earlier anti-suit injunction, the circumstances of that injunction are legally and factually distinct from those presently on appeal. The Fifth Circuit's decision expressly found that the Indonesian Court's annulment of the Award posed no threat to the Texas Judgment because U.S. courts had the discretionary authority to "ignore" the Indonesian decision and allow KBC to recover the Award. In contrast, the Cayman Action poses an unmistakable threat to the New York District Court's (and the Texas District Court's) jurisdiction because it seeks a Mareva injunction and damages in the precise amount of the Award, essentially annulling that award by restraining KBC's use of the very funds that the New York District Court ordered turned over to KBC to satisfy the Award.

such a claim, given Pertamina's dubious behavior throughout this process." *Id.* at 369. The Fifth Circuit further explained that Pertamina's pursuit of the Swiss annulment proceeding, its initial urging to the Texas District Court that Switzerland was the forum of primary jurisdiction, and its later abandonment of that position following the Swiss Supreme Court's dismissal of its annulment action were "*sufficient grounds to find Pertamina's behavior dubious and somewhat deceptive.*" *Id.* at 369 n.50 (emphasis added).

C. The Execution Proceedings

On February 22, 2002, KBC registered the Texas Judgment in the New York District Court pursuant to 28 U.S.C. § 1963.[11] On several occasions during the four years of execution proceedings that followed, the New York District Court found that Pertamina's litigation conduct was animated by a strategy of delay.[12] There

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[11] *See Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 313 F.3d 70, 77 (2d Cir. 2002), *cert. denied*, 539 U.S. 904 (2003).

[12] In a decision issued April 30, 2007, the New York District Court sanctioned Pertamina $500,000 for its bad-faith litigation conduct, finding that a Pertamina witness lied under oath in a deposition in an effort to frustrate the New York District Court from accurately ruling on the ownership of funds in New York bank accounts. *See Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, No. Civ. 21-MC-00098 (TPG), 2007 WL 1284903, at *6 (S.D.N.Y. April 30, 2007). The New York District Court invited KBC to make a further motion for sanctions covering Pertamina's misconduct that occurred after December 2004, when the original sanctions motion was filed. *See* Excerpt of

(continued...)

was never any doubt about Pertamina's intent: Pertamina's Finance Director, Alfred Rohimone, expressly stated in 2003 (when it was clear that payment of the Texas Judgment was likely unavoidable) that "what Pertamina is doing now is actually buying time. The objective is that KBC will be willing to negotiate so that the . . . claim can be reduced."[13]

II. THE CAYMAN ISLANDS LITIGATION AND THE ANTI-SUIT INJUNCTION

A. The Cayman Action

On September 15, 2006 – just two weeks before this Court denied Pertamina's third petition for certiorari[14] – Pertamina filed a lawsuit against KBC in the Cayman Islands (the "Cayman Action"). Pertamina's pleadings in the Cayman Action sought to "vitiate" the Award as a result of purportedly "newly discovered" documents that Pertamina alleged were evidence that KBC fraudulently overstated the size of the geothermal

(...continued)

Transcript of S.D.N.Y. Proceedings, Sept. 26, 2006, (Resp't App. 73a) ("[W]hat I am really looking for are lies, and there were some of those. And if that is repeated in this exercise there will be sanctions.") KBC filed an additional sanctions motion against Pertamina, but it has been stayed pending the outcome of this certiorari petition.

[13] *Karaha Bodas Co.*, 465 F. Supp. 2d at 289.

[14] *See PT Pertamina (Persero)*, 127 S. Ct. at 129, 166 L. Ed. 2d at 35.

resource of the Project.[15] In its Cayman Action, Pertamina sought, *inter alia*, (a) an injunction prohibiting KBC from prosecuting any actions to enforce the Award (including the then-ongoing litigation in the New York District Court), (b) "damages" equal to any sums received by KBC pursuant to the Award, and (c) a worldwide "Mareva" injunction freezing all of KBC's assets up to the amount of the Award, plus interest.[16]

Despite the fact that the Cayman Action sought damages in the exact amount of the Award, and despite its express demand to "vitiate" the Award, Pertamina has refused to acknowledge that its Cayman Action was an attempt to annul the Award. Instead, Pertamina contends that the Cayman Action is a separate and independent action, not one for annulment. *See Karaha Bodas Co.*, 500 F.3d at 122; *Karaha Bodas Co.*, 465 F. Supp. 2d at 290. To counter the obvious issues regarding the timing of its "fraud" claim, Pertamina has claimed repeatedly that the documents underlying the Cayman Action were "recently discovered." *See Karaha Bodas Co.*, 500 F.3d at 117. That claim is false. Pertamina admits that it received these documents in November 2002, but alleges that it never reviewed the documents until

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[15] As discussed *supra* in footnote 6, this is precisely the same issue that was litigated and decided during the arbitration.

[16] *See Karaha Bodas Co.*, 500 F.3d at 117; *Karaha Bodas Co.*, 465 F. Supp. 2d at 289.

August 2005. *See id.* The New York District Court considered the claim that these were "newly discovered" documents to be dubious indeed, stating that "the idea that this is newly discovered evidence is so suspect that I just affirmatively say it is simply probably not true . . . I think the probabilities are very, very strong that this is a flat misrepresentation."[17]

B. Pertamina's Concealment of the Cayman Action from the New York District Court

At a hearing on August 25, 2006, before the New York District Court regarding KBC's sanctions motion, KBC expressed concern that Pertamina was planning to initiate further litigation to hinder KBC's ability to receive the proceeds of the Texas Judgment. As a result, Judge Griesa asked Pertamina's counsel:

> [W]hat about that? Is there any intention to have further litigation, or can we end it? If the Supreme Court denies cert., will the money simply be paid to KBC or not?
>
> . . .

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[17] Sept. 26 Tr. S.D.N.Y. (Resp't App. 83a). Given Pertamina's acknowledgement that it has already spent over $20 million in legal fees in connection with its attempt to avoid paying the Award, it is simply not credible that these documents would have gone unreviewed for that long.

> The question is, and I have absolutely good reason for asking such a question in view of the record here, I want to know, assuming the Supreme Court denies cert., I want to know if Pertamina will now agree to the payment of the judgment, which would mean the release of the funds which are now held to secure that judgment, immediate release.
>
> . . .
>
> *[B]ecause even the possibility of further useless litigation is something that I want to be warned of,* and I want to know if it's in the offing, in view of this long record which you are aware of.

Excerpt of Transcript of S.D.N.Y. Proceedings, Aug. 25, 2006, (emphasis added) (Resp't App. 87a-89a). Pertamina's counsel claimed in response that he could not answer the question. *See id.* (Resp't App. 87a-88a). In a letter sent on August 28, 2006, Pertamina further evaded the New York District Court's questions, stating that "in the event that the Supreme Court denies the pending petitions, and assuming that the Court issues a turnover order with respect to the restrained funds appropriate in form and amount, Pertamina will not object before this Court to the

payment of the judgment."[18] Pertamina – which has never denied that it was planning the Cayman Action at the time – did not disclose the Cayman Action when it submitted its letter. Judge Griesa found that "of course, Pertamina knew. It deliberately concealed its plan from this Court and deliberately failed to have its attorney disclose that plan in the August 28 letter. No other conclusion is possible."[19] *Karaha Bodas Co.*, 465 F. Supp. 2d at 298. Given the subsequent filing of the Cayman Action, Judge Griesa properly found that Pertamina's letter constituted a "subterfuge" aimed at "deliberately conceal[ing]" its plan from the New York District Court. *See id.* at 298, 300.[20]

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[18] *See* Letter to Judge Griesa from Henry Weisburg, Aug. 28, 2006 (Resp't App. 91a).

[19] That was not the first time that Pertamina lied to the New York District Court about the Texas Judgment. On April 19, 2004, in response to KBC's demand that Pertamina produce a deposition witness, Pertamina's former counsel wrote to the New York District Court stating that Pertamina "commits to pay the Texas Judgment in the event that its forthcoming writ of certiorari concerning the Fifth Circuit's decision is denied or otherwise unsuccessful." Letter from M. Slater to Judge Griesa, Apr. 19, 2004 (Resp't App. 93a). Based on this "promise," Pertamina asked the New York District Court to stay any further enforcement proceedings. When the Supreme Court later denied Pertamina's petition for certiorari, Pertamina reneged on its promise to pay. *See* Excerpt of Transcript of S.D.N.Y. Proceedings, Oct. 5, 2004 (Resp't App. 97a) ("Your Honor . . . I regret that unfortunately I cannot effectuate that today and I cannot rely on the letter . . .").

[20] In hearing before the Second Circuit on May 21, 2007, Judge Cabranes questioned Pertamina's counsel regarding the deliberate concealment:

(continued...)

C. The Anti-Suit Injunction

On September 21, 2006, KBC filed a motion for an injunction preventing Pertamina from prosecuting the Cayman Action.[21] The New York District Court

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(...continued)

> JUDGE CABRANES: *Why would anyone use this curious locution before this Court if it wasn't to try to be evasive with respect to something that would transpire later? . . .* I mean wouldn't the normally English language statement that if you intended to simply acquiesce to the district court's judgment and let the funds pass free and clear to KBC, you would have said something roughly like that. *You wouldn't have seized upon this clever locution "not object before this Court the payment of the judgment."*
>
> MR. SINGER: I don't know, Your Honor.
>
> JUDGE CABRANES: *. . . It certainly looks curious at a minimum, perhaps even apparent that Pertamina is trying to evade the jurisdiction of the district court and to effectively to be free to move this dispute to yet another forum.*

Excerpt of Unofficial Transcript of Second Circuit Proceedings, May 21, 2007 (emphasis added) (Resp't App. 105a-106a).

[21] KBC has no doubt that it would ultimately be successful in the Cayman Action, just as it was successful in Hong Kong on precisely the same "fraud" issues. *See* discussion *infra* at 17. However, the full relitigation of these issues would be extremely

(continued...)

conducted a hearing on the issue on September 26, 2006, and immediately issued a partial injunction barring Pertamina from taking any action in the Cayman Islands challenging the New York District Court's jurisdiction or seeking to encumber any funds that would be turned over by it. *See* Sept. 26 Tr. (Resp't App. 76a). On October 6, 2006, after this Court denied Pertamina's third petition for certiorari,[22] the New York District Court ordered the turnover[23] of approximately $260 million, the remaining unpaid amount of the Texas Judgment. On December 8, 2006, the New York District Court issued an opinion granting a full anti-suit injunction against Pertamina. *See Karaha Bodas Co.*, 465 F. Supp. 2d at 283. After finding that the "main objective of Pertamina is to have the Cayman Islands court reach out to the United States and frustrate the consummation of the long and difficult litigation in the United States," the decision enjoined Pertamina from seeking, through affirmative

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(...continued)

costly and time consuming. After prevailing in every tribunal around the world, KBC should not be forced to participate in perpetual litigation.

[22] *PT Pertamina (Persero)*, 127 S. Ct. at 129, 166 L. Ed. 2d at 35.

[23] Pertamina claims in its Petition that it "promptly complied" with the turnover orders. Petr. Brief at 10. That claim is utterly false: For almost eight years, Pertamina has refused to pay a single penny of the Award. Because of that recalcitrance, the turnover orders were directed not at Pertamina, but at the bank in New York that had frozen Pertamina's funds. *See Karaha Bodas Co.*, 465 F. Supp. 2d at 291.

litigation in the Cayman Islands or elsewhere, to restrain KBC's use of the Texas Judgment proceeds or to attempt to recoup those proceeds through affirmative litigation. *Id.* at 298-99. The Second Circuit upheld that decision, with modifications, clarifying that Pertamina's actions warranted an anti-suit injunction under the strict standard imposed by the *China Trade* test. It is this decision that Pertamina now appeals.[24]

D. The Hong Kong Action

Pertamina's "fraud" claim – the same claim that the Arbitral Tribunal decided in 2000 and that Pertamina sought to relitigate in the Cayman Action – was decisively rejected by the Court of Appeal in Hong Kong. The court there conducted a three-day hearing carefully considering the voluminous evidence and affidavits that the parties submitted. In a decision

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[24] On October 11, 2007, the Cayman Court issued an order dismissing Pertamina's claim, stating:

> I am satisfied that in all the circumstances the description by the New York Court of Pertamina's proceedings before this Court as *"an abusive litigation tactic" is entirely justified.* It is clear that the proceedings amount in the circumstances to an attempt to use this Court for a collateral purpose, [namely] an attempt to further delay and avoid the enforcement of the arbitral award made almost 7 years ago. *In my view that was improper and unreasonable [and as] such an abuse of this Court.*

Decision, Cause No. 386 of 2006, Grand Court of the Cayman Islands (Oct. 11, 2007) (emphasis added) (Resp't App. 113a).

issued October 9, 2007, the Hong Kong Court of Appeals found Pertamina's claim to be "*singularly lacking in merit.*"[25] In rejecting the fraud claims, the Hong Kong Court found that Pertamina had not even made out a *prima facie* case for fraud, let alone demonstrated a reasonable prospect of success on the merits:

> *[T]his plea did not achieve the level of a "prima facie case", much less the standard of a "reasonable prospect of success."*
>
> . . .
>
> I do not think Pertamina comes anywhere near to establishing that the new evidence would have an important influence on the outcome of the arbitration. *Further, I do not think they show any fraud practiced by KBC at the court below or for that matter, at the arbitration proceedings.*

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[25] Excerpts of Decision, Civil Appeal no. 121/2003, High Court of the Hong Kong Special Administrative Region Court of Appeal (Oct. 9, 2007), at ¶142 (emphasis added) (Resp't App. 119a).

Id. (Resp't App. 117a, 121a, ¶¶ 134, 154) (emphasis added). Despite losing yet again, in yet another forum, Pertamina filed this Petition for certiorari a month later, seeking to overturn the decision of the Second Circuit so that it can litigate its hopeless "fraud" allegations for a third time in the Cayman Action. If this injunction is lifted, Pertamina will no doubt seek to engage in perpetual litigation, fighting "to the last drop of [its] blood."

REASONS FOR DENYING THE PETITION

Pertamina's certiorari Petition should be denied because none of the three circuit splits it alleges is ripe for review by this Court on the facts of this case. The only deep split alleged in Pertamina's Petition – that the Courts of Appeals differ over the standards for granting international anti-suit injunctions – is not implicated by the facts of this case because the lower court applied the standard most favorable to Pertamina and still found that an anti-suit injunction was warranted. Pertamina attempts to avoid this result by re-characterizing a well-known and longstanding two-way split in the lower courts as a three-way split instead, with the Second Circuit test purportedly occupying the middle ground, but this position finds no support in the numerous appellate decisions that address the issue.

The remaining splits alleged by Pertamina implicate at most one other lower court opinion apiece. Properly read, there is no actual conflict posed by either of these two pairs of opinions, as the facts of the cases differed dramatically in important respects. Moreover, even if the conflicts Pertamina alleges were genuine, the lower courts should be given additional time to sort out these issues, so that additional decisions from the Courts of Appeals can provide this Court with the benefit of additional reasoning on the issues involved before they are permanently settled.

Finally, the decision below as it stands serves important public policy interests regarding the swift

enforcement of arbitration awards and the finality of litigation. Pertamina has vexatiously delayed this straightforward commercial dispute for almost a decade, attempting to use the specter of endless litigation to leverage a "settlement" in a case that was resolved on the merits in 2000. A grant of certiorari by this Court on any issue would serve primarily as a validation of these delaying tactics, which have been criticized by courts around the world.

III. THE SECOND CIRCUIT APPLIED THE STRICTEST STANDARD IN GRANTING AN ANTI-SUIT INJUNCTION UNDER THESE UNIQUE CIRCUMSTANCES, AND CONSEQUENTLY PERTAMINA IS NOT ENTITLED TO RELIEF REGARDLESS OF THE STANDARD USED TO GRANT SUCH INJUNCTIONS.

Although it is generally correct that there is a longstanding split among the Courts of Appeals over the standard for issuing a foreign anti-suit injunction, that split is not implicated by the decision below. The Second Circuit is among those courts that apply the most restrictive test, and consequently Pertamina would not be entitled to relief regardless of which test this Court might adopt as a nationwide rule. Pertamina has attempted to avoid this result by re-casting the well-known and longstanding two-way split over the standards for granting international anti-suit injunctions into a three-way split instead. Then, Pertamina attempts to place the Second Circuit among

its newly-invented "middle group" in order to make it appear that a decision in favor of the most restrictive test would allow Pertamina to return to the Second Circuit in an attempt to obtain relief under a more restrictive anti-suit injunction standard. Pertamina's re-casting of the split finds no support in the decisions of the Courts of Appeals, which have consistently noted the existence of a two-way split and have placed the Second Circuit firmly on the most restrictive side. Consequently, this case is not a proper vehicle for this Court to use to settle the split over anti-suit injunction standards.

The standard used by the Second Circuit was first established more than twenty years ago and has consistently been recognized as the most restrictive standard. The Second Circuit's *China Trade* test for issuing an anti-suit injunction has two threshold requirements: "(1) the parties must be the same in both matters, and (2) resolution of the case before the enjoining court must be dispositive of the action to be enjoined." *China Trade and Dev. Corp. v. M.V. Choong Yong*, 837 F.2d 33, 35 (2d Cir. 1987). If these two threshold requirements are satisfied, courts may consider other relevant factors in deciding whether to grant the injunction. *Paramedics Electromedicina Comercial, Ltda, v. GE Medical Sys. Info. Tech., Inc.*, 369 F.3d 645, 652 (2d Cir. 2004). Of these, two factors have "greater significance" than the others: "namely, whether the foreign action threatens the jurisdiction or the strong public policies of the enjoining forum." *Karaha Bodas Co.*, 500 F.3d at 126 (citing *China Trade*,

837 F.2d at 36). The Second Circuit properly weighed these factors when it upheld the anti-suit injunction issued by the New York District Court.

As courts across the nation have observed, the *China Trade* test places the Second Circuit firmly among the most conservative circuits in terms of the test it applies in determining whether and when anti-suit injunctions may issue. The Second Circuit originally adopted this extremely restrictive test precisely because it recognized and placed a high value on concerns over the damage such injunctions can do to international relations. *See Paramedics*, 369 F.3d at 652 ("[P]rinciples of comity counsel that injunctions restraining foreign litigation be 'used sparingly' and 'granted only with care and great restraint.'") (quoting *China Trade*, 837 F.2d at 36). The decision by the Second Circuit in this case is completely in accord with the important principles of comity it espoused.

The Courts of Appeals have repeatedly and recently recognized the existence of a two-way split over the standards for issuing anti-suit injunctions, and placed the Second Circuit on the conservative side of this binary split. As the First Circuit explained as recently as 2004, "[t]wo basic views have emerged. For ease in reference, we shall call the more permissive of these views the liberal approach and the more restrictive of them the conservative approach." *Quaak v. Klynveld Peat Marwick Goerdeler Bedrijfsrevisoren*, 361 F.3d 11, 17 (1st Cir. 2004) (citing Note, *Antisuit Injunctions and International Comity*, 71 VA. L. REV. 1039, 1049-51

(1985)). The First Circuit went on to observe that the Fifth and Ninth Circuits have adopted a liberal approach, with the Seventh Circuit expressing support for this approach in dicta. *See id.* at 17. Under the liberal approach, courts give international comity some consideration, but tend to define comity interests narrowly and give comity concerns modest weight. *See id.* In practice, an international anti-suit injunction may issue in these more permissive circuits "whenever there is a duplication of parties and issues and the court determines that the prosecution of simultaneous proceedings would frustrate speedy and efficient determination of the case." *Id.* (citing *Kaepa, Inc. v. Achilles Corp.*, 76 F.3d 624, 627 (5th Cir. 1996), *cert. denied*, 519 U.S. 821 (1996); *Seattle Totems Hockey Club, Inc. v. Nat'l Hockey League*, 652 F.2d 852, 856 (9th Cir. 1981), *cert. denied*, 457 U.S. 1105 (1982)).

Rejecting this approach, the First Circuit expressly placed itself within the "conservative" camp, which "[f]our courts of appeals have espoused." *Id.* "Under this approach, the critical questions anent the issuance of an international antisuit injunction are whether the foreign action either imperils the jurisdiction of the forum court or threatens some strong national policy." *Id.* (citing *Stonington Partners, Inc. v. Lernout & Hauspie Speech Products.*, 310 F.3d 118, 127 (3d Cir. 2002); *China Trade*, 837 F.2d at 36). The First Circuit explained that the conservative approach used by the Second, Third, Sixth, and D.C. Circuits imposes a presumption against international anti-suit injunctions, "is more respectful of principles of international

comity," and recognizes that issuing an anti-suit injunction is a step that should be taken only with the utmost care and restraint. *Quaak* at 18. Nowhere in its opinion does the First Circuit note any tension with its decision and earlier decisions of the Third, Sixth, and Eighth Circuits, as Pertamina alleges exists. *See* Petr. Brief at 31. There is no language suggesting, as Pertamina does, that the First Circuit was imposing a different test than those circuits, *see* Petr. Brief at 32-34, a test that would permit consideration of various "equitable factors" in situations where the Third, Sixth, and Eighth Circuits would not.

Nor does Pertamina's characterization of a three-way split find support in earlier circuit decisions. In 2001, the Third Circuit also characterized the foreign anti-suit injunction split as binary. "The federal Courts of Appeals have not established a uniform rule for determining when injunctions on foreign litigation are justified. Two standards, it appears, have developed." *Gen. Elec. Co. v. Deutz AG*, 270 F.3d 144, 160 (3d Cir. 2001). Just as the First Circuit would do a few years later, the Third Circuit described the Fifth, Seventh, and Ninth Circuits as generally applying the "liberal" standard, and explained that "the Second, Sixth, and District of Columbia Circuits use a more restrictive approach." *Id.* Again, the Third Circuit specifically cited the Second Circuit's decision in *China Trade* in support of its assertion, noting that these courts "approve enjoining foreign parallel proceedings only to protect jurisdiction or an important public policy. Vexatiousness and inconvenience to the parties carry

far less weight." *Id.* at 161. Consequently, while Pertamina asserts that the Third Circuit would not consider vexatiousness and inconvenience to the parties at all (labeling these factors "other equitable considerations"), *see* Petr. Brief at 33-34, the Third Circuit implied just the opposite when it decided that "[o]ur Court is among those that resort to the more restrictive standard." *Gen. Elec.*, 270 F.3d at 161. Pertamina's contention that some circuits would refuse to consider other equitable factors at all appears to be the result of purposefully misreading selected dicta from various opinions.

Indeed, the Second Circuit's *China Trade* test has been consistently placed on the conservative side of the binary circuit split going back at least fifteen years. The Sixth Circuit, in a decision joining the conservative courts, observed the existing split in 1992 as involving on one side "[t]he Ninth and Fifth Circuits [that] hold that a duplication of the parties and issues, alone, is generally sufficient to justify the issuance of an international injunction" and on the other "the Second and DC Circuits [that] have held the standard for granting a foreign anti-suit injunction is whether the injunction is necessary to protect the forum court's jurisdiction or to prevent evasion of the forum court's important public policies." *Gau Shan Co. Ltd. v. Bankers Trust Co.*, 956 F.2d 1349, 1353 (6th Cir. 1992). Again, the Sixth Circuit specifically cited the Second Circuit's *China Trade* decision in support of the conservative position it adopted. *See id.* Numerous courts in between *Gau Shan* and *Quaak* have also

characterized the split as binary and placed the Second Circuit on the most restrictive side. *See, e.g., Stonington Partners*, 310 F. 3d at 126-27; *Kaepa*, 76 F.3d at 627 n.12; *Allendale Mut. Ins. Co. v. Bull Data Sys., Inc.*, 10 F.3d 425, 431-32 (7th Cir. 1993). If, as Pertamina asserts, there is a third side to the split between courts that will consider other equitable factors and those that will not, it is curious that none of these courts has noticed and commented on it.

This Court should accept the lower courts' uniform characterization of this split as a binary one, and recognize, as each circuit has, that the Second Circuit's test embraces the most conservative standard. Because the Second Circuit issued an anti-suit injunction against Pertamina using the most restrictive standard, which was the most favorable to Pertamina, Pertamina would not be entitled to any relief even if this Court granted certiorari and ruled in its favor on the choice of standards. Consequently, the existing split among the Courts of Appeals on anti-suit injunction standards is simply not implicated by the facts of this case, and the Petition should be denied for that reason alone.

IV. ANY GRANT OF CERTIORARI IN THIS CASE WOULD THWART IMPORTANT PUBLIC POLICY AND EQUITABLE CONSIDERATIONS BY VALIDATING PERTAMINA'S HIGHLY QUESTIONABLE DELAYING TACTICS IN THIS CASE, WHICH HAVE BEEN THE SOURCE OF CONSTERNATION TO COURTS AROUND THE WORLD.

Leaving the decision below intact serves important public policy considerations that would be undermined by any grant of certiorari by this Court, even if this Court ultimately affirmed the opinion below or otherwise ruled in favor of KBC. Pertamina's attempt to pursue the Cayman Action violated the public policies of: (1) the finality of litigation, (2) respect for arbitration clauses, (3) respect for arbitral awards, especially in the international arena, and (4) the discouragement of forum shopping and vexatious conduct. The injunction was intended to stop Pertamina from engaging in perpetual litigation around the world to thwart an arbitration award that it should have paid almost a decade ago. Any action by this Court vacating the injunction or calling its validity into question even temporarily would effectively validate Pertamina's delaying tactics and encourage other parties to engage in similarly dubious legal behavior.

A. Federal policy favors finality of litigation.

Federal law embodies a strong policy favoring finality of litigation. *See Rubin v. Mfrs. Hanover Trust Co.*, 661 F.2d 979, 996 (2d Cir. 1981) ("[S]trong policies favoring finality in litigation and conservation of judicial resources lead an appellate court to disregard contentions that a party has not asserted at trial or has failed to raise on appeal."). Pertamina's commencement of the Cayman Action on the eve of this Court's final ruling – and its concealment of that intention from the New York District Court – demonstrate an obvious contempt for this fundamental policy. Pertamina waited until more than eight years of arbitration and litigation in this case had transpired before bringing its Cayman Action. As the New York District Court expressly found,[26] if Pertamina actually believed it had been "defrauded" by KBC, it could have raised its claim much earlier by interposing it, at a minimum, in either the New York District Court or the Texas District Court proceedings.[27] Rather than utilize these options,

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[26] *Karaha Bodas Co.*, 465 F. Supp. 2d at 297.

[27] Pertamina seemingly misunderstands the New York District Court's discussion of Pertamina's missed opportunity to address its claims through Rule 60(b). It is correct that Rule 60(b) is not, in and of itself, a public policy. However, it is a rule that *embodies* important national policies, seeking to reconcile "a tension between two goals: (1) that of ensuring that the court's judgment reflect[s] an appropriate adjudication of the rights and obligations of the parties, and (2) *that of finally terminating the litigation in order to provide the parties with certainty as to the nature and extent of their rights and obligations as adjudicated.*" *In re*

(continued...)

Pertamina chose instead to withhold and delay its claim until the last possible minute, going so far as to actively conceal and misrepresent its intentions to the New York District Court. Given the overwhelming evidence of Pertamina's intent to delay and the ample opportunities it had to assert its fraud claim previously, there can be little doubt that Pertamina's litigation conduct was inimical to the strong federal policy favoring finality in litigation, and that the anti-suit injunction was necessary to properly vindicate that policy.

B. Federal policy favors enforcement of arbitration clauses.

"Federal policy strongly favors enforcement of arbitration agreements." *See Paramedics*, 369 F.3d at 653 (citing 9 U.S.C. § 2; *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983)). The claim in the Cayman Action that KBC defrauded Pertamina during the performance of the underlying contract (the "direct fraud" claim) is, by the plain terms of the arbitration agreement between Pertamina and KBC, subject to mandatory arbitration. *See Karaha Bodas Co.*, 364 F.3d 274, 282 (5th Cir. 2004). Instead of abiding by its agreement to arbitrate, Pertamina ignored it altogether when it commenced the Cayman Islands action. The anti-suit injunction was

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(...continued)

Frigitemp Corp., 781 F.2d 324, 326-27 (2d Cir. 1986) (emphasis added).

consequently necessary to effectuate the important federal policy in favor of the enforcement of arbitration agreements.

C. Federal policy demands that arbitration awards be enforced swiftly and efficiently.

Leaving the anti-suit injunction undisturbed is also justified by the strong public policy favoring respect for arbitration awards. *See, e.g., B.L. Harbert Int'l, L.L.C. v. Hercules Steel Co.*, 441 F.3d 905, 913 (11th Cir. 2006) ("When a party who loses an arbitration award assumes a never-say-die attitude and drags the dispute through the court system without an objectively reasonable belief it will prevail, the promise of arbitration is broken."). This Court has commented frequently on the desirability of encouraging the use of arbitration as a means of dispute resolution in cases both national and international. More than twenty years ago this Court explained "we are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution." *Mitsubishi Motors Corp. v. Solar Chrystler-Plymouth Inc.*, 473 U.S. 614, 626-27 (1985).

Instead, in today's world this Court has commented that effective international arbitration is:

> [An] almost indispensable precondition to achievement of the orderliness and

> predictability essential to any international business transaction. Furthermore, such a provision obviates the danger that a dispute under the agreement might be submitted to a forum hostile to the interests of one of the parties or unfamiliar with the problem area involved.

Scherk v. Alberto-Culver Co., 417 U.S. 506, 516 (1974). This Court has further explained the danger that "[a] parochial refusal by the courts of one country to enforce an international arbitration agreement would not only frustrate these purposes, but would invite unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages." *Id.* at 516-17. This Court has even gone so far as to criticize lower courts for issuing stays that interfere with the rapid enforcement of arbitral awards, explaining that they "frustrate[] the [federal] statutory policy of rapid and unobstructed enforcement of arbitration agreements." *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 23.

Disturbing the decision below would contravene this important and oft-repeated guidance from this Court, and would send the wrong message to lower courts and parties tempted to resist arbitration. The Award in this case was issued seven years ago, yet duplicative litigation in several jurisdictions continues. As the Second Circuit observed in upholding the injunction:

> We have noted "the strong public policy in favor of international arbitration," and the need for proceedings under the New York Convention "to avoid undermining the twin goals of arbitration, namely, settling disputes efficiently and avoiding long and expensive litigation." *These important objectives would be undermined were we to permit Pertamina to proceed with protracted and expensive litigation that is intended to vitiate an international arbitral award that federal courts have confirmed and enforced.*

Karaha Bodas Co., 500 F.3d at 126 (citations omitted and emphasis added). This Court now has the opportunity to send the proper message regarding the desirability of swift and effective international arbitration by denying Pertamina's latest certiorari Petition.

D. Federal law does not countenance forum shopping or other vexatious conduct.

Finally, continuance of the anti-suit injunction is consistent with the strong federal policies prohibiting forum shopping. *See Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 508-09 (2001) (interpreting rule to avoid resultant forum shopping); *Ibeto Petrochemical Indus. Ltd. v. M/T Beffen*, 475 F.3d 56, 64 (2d Cir. 2007) (explaining that "equitable considerations such as deterring forum shopping favor the [anti-suit] injunction"). Pertamina raised its fraud

allegations before the Arbitral Tribunal, which took those allegations into consideration when issuing its Award in 2000. Pertamina's subsequent arguments concerning the propriety of the Award have been rejected by courts in every country to consider them, including the courts of Indonesia. Although Pertamina could have raised its fraud allegations in most of these previous fora, it chose instead to file its claim alleging fraud in the Cayman Islands, a jurisdiction whose courts were unfamiliar with both the dispute and Pertamina's prior litigation tactics.

The Cayman Action was indisputably vexatious. After almost a decade of arbitration and litigation, Pertamina waited until two weeks before the funds were likely to be paid to KBC to bring a new action that sought, on its face, to strip the New York District Court of enforcement jurisdiction and enjoin KBC from using the Texas Judgment proceeds. Because Pertamina had been in possession of the documents that allegedly support its fraud claim[28] for at least four years when it filed the Cayman Action, this delay is inexcusable and impossible to consider as good faith litigation conduct. As the New York District Court noted, Pertamina had time to raise these "fraud" allegations before the Texas District Court in a "direct and straightforward" manner; instead, they chose to

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[28] As noted *supra* at 17, the Hong Kong Court of Appeals carefully considered and soundly rejected Pertamina's fraud allegations.

make these allegations in a forum that has "virtually no significance" to the dispute.[29]

V. FEDERAL COURTS HAVE CONTINUING JURISDICTION TO PROTECT AND EFFECTUATE THEIR JUDGMENTS.

Federal courts maintain continuing jurisdiction to protect their final judgments, even after satisfaction. This Court has long held that federal courts have the power and duty to ensure that litigants retain "the substantial fruits of a judgment rendered in their favor," and that federal courts have jurisdiction to protect a judgment "no matter how or when [a party] may attempt to evade it or escape its effect[.]" *Dietzsch v. Huidekoper*, 103 U.S. 494, 497 (1880); *Local Loan Co. v. Hunt*, 292 U.S. 234, 239 (1934) ("That a federal court of equity has jurisdiction of a bill ancillary to an original case or proceeding in the same court, whether at law or in equity, to secure and preserve the fruits and advantages of a judgment or decree rendered therein, is well settled."); *see also* 28 U.S.C. § 1367(a) (codifying doctrine of ancillary jurisdiction by providing that federal courts have jurisdiction over "all other claims that are so related to the claims in the action within [the court's] original jurisdiction that they form part of the same case or controversy under Article III"); All Writs Act, 28 U.S.C. § 1651(a) (providing that federal courts "may issue all writs necessary or appropriate in

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[29] *Karaha Bodas Co.*, 465 F. Supp. 2d at 297-98.

aid of their respective jurisdictions and agreeable to the usages and principles of law").

Pertamina has argued that the Second Circuit's opinion supporting these propositions is contrary to the decision reached by the Eighth Circuit in *Goss Int'l Corp. v. Man Roland Druckmaschinen Aktiengesellschaft*, 491 F.3d 355 (8th Cir. 2007). The instant Petition does not pose a good opportunity for this Court to review any putative shallow split in circuit authority because the facts of the two cases differ so dramatically, rendering it difficult if not impossible to accurately gauge whether a meaningful split yet exists between the circuits. The Eighth Circuit in *Goss*, while occasionally using more expansive dicta, carefully limited its holding to the unusual facts of that case. Moreover, its decision was based on various factors including (1) the direct threat posed to international bilateral relations by an injunction and (2) concerns regarding the constitutional balance of powers, neither of which is present in this case.

More specifically, the *Goss* case involved a judgment issued under the Antidumping Act of 1916, which Congress prospectively repealed as a result of a dispute before the World Trade Organization ("WTO"). *See id.* at 356-359. As the repeal was prospective, it did not affect the *Goss* judgment. *See id.* at 358. Because Japan considered that prospectivity to be contrary to the United States' obligations under the WTO agreements, it enacted a Special Measures Law, a

clawback statute that specifically allows Japanese entities to recover judgments awarded under the 1916 Act. *See id.* This was not a broad statute; in fact, the Special Measures Law affected only one judgment: the *Goss* decision. *See id.* at 366 ("[T]he only lawsuit possible under the Special Measures Law can be brought against Goss alone."). Given the direct and pointed conflict between the U.S. and Japanese legislatures regarding the validity of the *Goss* judgment, the *Goss* anti-suit injunction "would be deeply offensive to the Japanese government." *Goss v. Tokyo Kikai Seisakuscho, Ltd.*, 435 F. Supp. 2d. 919, 929 (N.D. Iowa 2006), *vacated*, 491 F.3d 355 (8th Cir. 2007).

It is clear that the instant case does not involve such a direct international conflict between two nations. The Eighth Circuit recognized the unique circumstances of the *Goss* case and expressly limited its opinion, finding that while the anti-suit injunction could not be maintained under those circumstances, "we reach no categorical conclusion regarding the propriety of the issuance of an anti-suit injunction in all cases involving the preservation of a judgment." *Goss*, 491 F.3d at 368 n.9. Moreover, the *Goss* Court did not cite to a single case that held that subject matter jurisdiction terminates when the judgment is paid. Instead, it cited *Peacock v. Thomas*, 516 U.S. 349 (1996), which stands only for the inverse proposition that "the district court retained ancillary enforcement jurisdiction *until* satisfaction of the judgment." *Goss*, 491 F.3d at 365 (emphasis in original). As noted by the *Goss* Court, this

Court explained in *Peacock* the importance of the maintenance of jurisdiction after issuance of the judgment: "Without jurisdiction to enforce a judgment entered by a federal court, 'the judicial power would be incomplete and entirely inadequate to the purposes for which it was conferred by the Constitution.'" *Peacock*, 516 U.S. at 356 (internal quotations omitted). Consequently, the rule, unchanged by the unique facts of the *Goss* case, is that federal courts maintain jurisdiction to protect a final judgment even after satisfaction. There is simply no circuit split on this issue implicated by the facts of this case.

CONCLUSION

For all the foregoing reasons, Pertamina's Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX 1 — NEW RELEASES, REUTERS DATED NOVEMBER 6, 2007

REUTERS

Pertamina to appeal Karaha case in US court -officials

Tues Nov 6, 2007 3:16am EST

By Muklis Ali

JAKARTA, Nov 6 (Reuters) - Indonesian state oil firm Pertamina will appeal to the U.S. Supreme Court to try to recover some $300 million it was ordered to pay to Karaha Bodas to settle a dispute, Pertamina officials said.

Pertamina and U.S. firm Karaha agreed in 1994 to develop a geothermal energy project in Indonesia's West Java province, but the 1997-98 Asia financial crisis put an end to the plan and led to a prolonged legal battle.

Both parties finally reached a settlement earlier this year, when Karaha was paid more than $300 million.

But a Pertamina official, who declined to be named, said the money paid to Karaha came from a Ministry of Finance bank account, adding that Pertamina and the ministry were now fighting over who should bear the costs.

"$319 million has been paid to Karaha and that included interest. That was government money. Pertamina has been asked to pay back the money to the government," the official said.

Pertamina is now trying to recover the money from Karaha and has launched appeals in various jurisdictions including a New York district court, Hong Kong, and the Cayman Islands.

The company claims Karaha committed a fraud, according to court documents, but its suits have been rejected by the various courts.

"We have a number of steps we can take," Pertamina President Director Ari Seomarno said on Tuesday. "We will fight till the end, we will fight until the last drop of our blood."

Another Pertamina official, who asked not to be identified by name, said Pertamina would file an appeal with the U.S. Supreme Court.

"Pertamina thought there was a fraud by Karaha in the geothermal project," the official said.

Karaha, which spent $111 million on the geothermal project before it was halted, asked a Swiss arbitration panel in 1999 to force Pertamina to repay its lost investment and cover future profits.

The tribunal awarded Karaha, which is owned by Caithness Energy LLC and FPL Energy LLC, a subsidiary of FPL Group (FPL.N: Quote, Profile, Research), $261 million in 2000.

Last year, the U.S. Supreme Court turned down an appeal by Pertamina to overturn that award. The money, plus interest, was paid to Karaha earlier this year.

A New York court also recently ordered Pertamina to pay $500,000 to Karaha because a former Pertamina official had committed perjury in the case. (Editing by Sara Webb & Ian Geoghegan)

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DECLARATION OF JAMES E. BERGER

I, James E. Berger, declare as follows:

1. I am an attorney with the law firm of Paul, Hastings, Janofsky & Walker LLP, counsel for Respondent Karaha Bodas Company, L.L.C. ("KBC") in this matter. I offer this declaration in support of KBC's Brief in Opposition to Pertamina's Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit. I am a member in good standing of the bar of this Court.

2. I have personal knowledge of the matters set forth herein, and could and would testify competently thereto if called upon to do so.

3. As set forth herein, over the past six years, courts around the world have repeatedly criticized Pertamina's litigation misconduct in these proceedings.

2001

4. On July 13, 2001, the Honorable Nancy Atlas, of the U.S. District Court for the Southern District of Texas, convened a hearing on Pertamina's Motion for Stay Pending Resolution of Swiss Appeal. During that hearing, Judge Atlas made the following statements after learning that Pertamina had yet to pay a filing fee due to a Swiss Court:

> **[I]t is ironic how many times your client has failed to respond or waited until the last day to take action in the course of the preliminary proceedings and in the arbitration and then the appeal.**
>
> . . .
>
> I do not consider it pursuing your appeal or your efforts to appeal diligently when you wait until the last day to file.

Tr. of Proceedings before S.D. Tex., July 13, 2001, at 11:2-5, 12:22-24 (emphasis added).

2002

5. On February 15, 2002, Judge Atlas, convened a Discovery Conference and made the following statements:

a. Concerning Pertamina's failure to appear for a noticed deposition: "**Pertamina has done nothing in this case without being forced to do it.**" Tr. of Proceedings before S.D. Tex., Feb. 15, 2002 ("Feb. 15 Tr.") at 5:8-9 (emphasis added).

b. Concerning her skepticism about Pertamina's willingness to cooperate reasonably with discovery: "**Pertamina has not engendered a lot of confidence in me about its good faith.**" Feb. 15 Tr. at 14:3-4 (emphasis added).

6. On March 29, 2002, Judge Atlas convened a hearing on KBC's Motion for a Temporary Restraining Order regarding Pertamina's action in Indonesia seeking to prevent KBC from continuing with the enforcement proceedings in the United States. During that hearing, Judge Atlas made the following statements:

a. Concerning Pertamina's evasion of court orders: "**I'm concerned in the extreme about the apparent attempt to undercut or evade the jurisdiction of this Court** by going to Indonesia and trying to relitigate this matter and prevent KBC from pursuing its post-judgment efforts." Tr. of Proceedings before S.D. Tex., Mar. 29, 2002 ("Mar. 29 Tr.") at 5:11-15 (emphasis added).

b. Concerning Pertamina's willingness to follow court orders: "I have severe concerns because the

Indonesian court has been asked to do things which you now represent you don't intend to do. . ." Mar. 29 Tr. at 13:14-17.

7. On April 2, 2002, Judge Atlas convened a hearing on KBC's Motion for Contempt against Pertamina regarding Pertamina's violation of the Temporary Restraining Order regarding the Indonesian action. During that hearing, Judge Atlas made the following statements:

a. Concerning Pertamina's repeated evasion of court orders: "The concerns I have are **every time I issue an order or say anything, what comes back is some argument that gets around to – and so even my most, my hopefully most simple statements get evaded.** And I'm concerned about that." Tr. of

Proceedings before S.D. Tex., Apr. 2, 2002 ("Apr. 2 Tr.") at 17:8-16 (emphasis added).

b. Concerning Pertamina's violation of a prior Temporary Restraining Order: **"there was clearly a violation of the literal terms of my order . . . ."** Apr. 2 Tr. at 19:7-8 (emphasis added).

c. Concerning Pertamina's contempt:

> First of all, there is no question in my mind that Pertamina . . . had notice of my order to withdraw its injunctive relief request, and **there is no question in my mind that they chose for their own reasons, maybe logistical, maybe intentional, not to comply with that request.**
>
> There is no question that the Court order was in effect from the moment I issued it onward, so **I do find that Pertamina is in contempt, civil contempt. . . . Pertamina had the power to speak [in the Indonesian court], and chose not to for its business reasons.**

Apr. 2 Tr. at 32:11-21, 33:7-9 (emphasis added).

d. In discussing the contempt ruling, Judge Atlas exclaimed **"I'm furious, Counsel. I'm furious.** But I have issued what I think to be a temperate response. Don't test me." Apr. 2 Tr. at 42:7-9.

8. On April 11, 2002, Judge Atlas issued a Temporary Restraining Order and Order of Contempt against Pertamina regarding the Indonesian action. The Order contained the following statement: "The Temporary Restraining Order was clear and precise. There is no question, as evidenced by the record, that **Pertamina had notice of the Court's injunction issued March 29, 2002, and that Pertamina knowingly did not comply with the Order.**" S.D. Tex. Order, Apr. 11, 2002, at 4 (emphasis added).

9. On April 26, 2002, Judge Atlas issued an Order Granting a Preliminary Injunction against Pertamina regarding the Indonesian action. The Order contained the following statements:

a. "**Pertamina clearly seeks to circumvent this Court's rulings** by belatedly relitigating the validity of the Arbitral Award in a presumably more sympathetic forum." S.D. Tex. Order, Apr. 26, 2002 ("Apr. 26 Order"), at 14 (emphasis added).

b. "**Pertamina's efforts to relitigate the same issues actually decided by this Court is an obvious attempt to attack this Court's jurisdiction by relitigating old issues in a more favorable forum.**" Apr. 26 Order at 17 (emphasis added).

c. "Pertamina is much like the **vexatious** plaintiffs enjoined" in a similar case. Apr. 26 Order at 17 n.10 (emphasis added).

d. "The Indonesian Action appears to be no more than **a last ditch effort to avoid the effect of this Court's Judgment** enforcing the Arbitral Award." Apr. 26 Order at 18 (emphasis added).

10. On July 22, 2002, Judge Atlas issued a Memorandum and Order denying Pertamina's motion to stay enforcement of the U.S. judgment to permit Pertamina to pursue annulment in Indonesia. The Memorandum and Order contained the following statement: **"Pertamina has apparently continued, in direct violation of this Court's order, to prosecute the Indonesian action."** S.D. Tex. Mem. and Order, July 22, 2002, at 5 (emphasis added).

11. On July 22, 2002, Judge Atlas entered an Order requiring Pertamina to take specific actions in furtherance of the Preliminary Injunction regarding the Indonesian action. The Order contained the following statement: "**Pertamina did not comply with the TRO**..." S.D. Tex. Order, July 22, 2002, at 3 (emphasis added).

12. On December 5, 2002, Judge Atlas convened a discovery conference and made the following statement concerning Pertamina's failure to respond promptly to Court orders:

> I'm wondering whether, in fact, there is a lawyer with more knowledge of your client's goings on that should be participating in these phone calls. And I don't mean an American lawyers, I mean a lawyer who speaks English who is closer to the seat of power.

> And I'll tell you, I don't mean to cast dispersions on you. You may be doing the absolute best you can but you sit halfway around the world, and you constantly are saying, "I'm trying." And you're the only person that the courts have before us; and so, I am confused about what the best way is to impose enforceable and yet realistic time requirements for any and all of my rulings.
>
> I am open to suggestions from you because if the rulings are made and they're clear and your client doesn't comply within a reasonable amount of time or by a deadline that we've agreed is reasonable, I don't – I don't know what I'm supposed to do. **I don't want to put you in jail. I want to put somebody who's causing the problem in jail. . . but I need guidance from you about who is actually accountable for Pertamina for document production because I do not want to punish the messenger.**

Tr. of Proceedings before S.D. Tex., Dec. 5, 2002, at 11:10-12:8 (emphasis added).

13. On March 12, 2003, Judge Atlas convened a hearing in response to KBC's notification that Pertamina had not complied with the Court's rulings regarding discovery. During that conference, Judge Atlas made the following statements:

a. Concerning Pertamina's delayed responses to KBC's letters to the Court: "Frankly, I can't rule today. **My frustration is extreme. It is not only unfair for Pertamina to be responding so late, it is a gross imposition on the Court for me to deal with 100 pages of detailed discovery disputes in under 24 hours.**" Tr. of Proceedings before S.D. Tex., Mar. 12, 2003 ("Mar. 12 Tr.") at 3:2-7 (emphasis added).

b. Concerning Pertamina's dilatory conduct regarding discovery: "**I'm tired of the delays both to**

me and by Pertamina in general. . ." Mar. 12 Tr. at 3:11-12 (emphasis added).

14. On March 27, 2003, the High Court of Hong Kong issued a Decision denying Pertamina's summons to set aside a prior order to enforce the Arbitral Award. The Decision contained the following statement concerning Pertamina's delay in bringing its arguments:

> Normally the court would be inclined not to exercise the discretion in such circumstances. In this case, however, the balance would have been tipped against the norm for just one reason. **That reason being the lateness of the emergence of Pertamina's contentions.** The argument that the *lex arbitri* arbitration is Indonesian law and the complaint that the political risk policy was not disclosed, **can both be described as "11th hour" challenges. Such lateness would, in my judgment, dilute the strength of the arguments to the extent that it would have been appropriate to exercise the**

> **discretion to, nonetheless, enforce the award.**

Decision, No. HCCT28/2002, High Court of Hong Kong (Mar. 27, 2003), at ¶ 69 (emphasis added).

15. On June 18, 2003, the U.S. Court of Appeals for the Fifth Circuit issued an Opinion vacating the Preliminary Injunction regarding the Indonesian Action that was issued by the Southern District of Texas. The Opinion contained the following statements:

a. Concerning the possible hardships that KBC could face due to Indonesia's potential to assess fines on KBC for continuing with the U.S. litigation: "Although it is always possible for Pertamina to pursue enforcement of fines in third countries, it seems extremely unlikely that any country would countenance such a claim, given **Pertamina's dubious behavior**

throughout this process." *Karaha Bodas Co., L.L.C. v. Pertamina*, 335 F.3d 357, 369 (5th Cir. 2003).

b. Concerning Pertamina's delay in filing the Indonesian Action and misrepresentations:

> Only after Swiss courts had dismissed Pertamina's appeals, and the district court enforced the award in favor of KBC, did Pertamina file suit in Indonesian court. Regardless of its reasons for delay, its complete silence as to its ability to file in Indonesian court (based on the applicability of Indonesian arbitral law) throughout the span of litigation, is certainly **sufficient grounds to find Pertamina's behavior dubious and somewhat deceptive.** Whether or not the Indonesian court is a proper forum, Pertamina implied more than once that Swiss law was the applicable arbitral law in this dispute.

Id. at 369, n.50 (emphasis added).

c. Concerning Pertamina's behavior:

> [E]ven if **Pertamina is acting in bad faith by pursuing annulment in Indonesia (as it appears to be)**, the district court's attempt to enjoin Pertamina effectively translates into an attempt to enjoin the Indonesian court itself and to interfere with the sovereign actions of the GOI.
>
> . . .
>
> **It is true that Pertamina is likely in the wrong here**, and that Indonesia's injunction and annulment may violate comity and the spirit of the Convention much more than would the district court's injunction.
>
> . . .
>
> We empathize with the district court and share its **frustrations at the acts of Pertamina and its counsel**.

Id. at 372-75 (emphasis added).

2004

16. On January 27, 2004, the Honorable Thomas P. Griesa, of the U.S. District Court for the Southern District of New York, convened a hearing

regarding several outstanding turnover motions. During that hearing, Judge Griesa made the following statements:

a. Concerning Pertamina's argument that the Government of Indonesia's ("GOI") attempt to retroactively revoke Pertamina's retention fee for 2003:

> **What was the reason for that, to get out of this judgment?**
>
> . . .
>
> **I think that the position you are now taking is going to raise very, very considerable problems of credibility** because we have had continuous litigation on this matter, which you all know about. We have had a series of motions in 2003. We had many presentations, and we have had many presentations by counsel, and **I am going to tell you counsel's credibility is at stake here too.** If the retention fee was all over with as of the beginning of 2003, **then I was totally misled in the proceedings I have been conducting.**

> I asked in my questions about whether there had been any change of arrangement or change of method of calculation, because at some point, a couple of points in these voluminous papers, there was some hint that that that [sic] might be occurring; but those hints were contradicted, I believe, by the great weight of the presentations.
>
> . . .
>
> I am very concerned that the intention of this court and the intention of the Court of Appeals is being subverted. . .
>
> [W]hat your [Pertamina and the GOI] arguments do is **make a mockery** of what both courts [the S.D.N.Y. and the Second Circuit] have legitimately tried to achieve.

Tr. of Proceedings before S.D.N.Y., Jan. 27, 2004 ("Jan. 27 Tr.") at 13:12-13, 15:17-16:7, 24:12-14, 31:7-13 (emphasis added).

b. Concerning the effect of the retention fee change on the restraint of the funds:

> **I am going to tell you right now that if the name is changed,** obviously, if my ruling gets reversed it gets reversed, but the change of the name, **I hope nobody in Indonesia thinks that is going to avoid the restraint.** . . . I would hope that you would tell them that that will not occur.

Jan. 27 Tr. at 23:24-24:5 (emphasis added).

17. On March 4, 2004, Judge Griesa convened a hearing regarding security for the judgment where he made the following statement concerning Pertamina and the GOI's discovery delays:

> Mr. Slater and Ms. Lamm, what I see is I **don't get very satisfactory answers from your side about how the discovery is being handled**, and I am not going to sit here and try to struggle with this any longer. But it is quite apparent to me that your side of the litigation is not acting with any degree of urgency in trying to get the discovery concluded so that I am in a position to decide about the unadjudicated accounts. . . .

> I have a very slow moving discovery response from Pertamina.

Tr. of Proceedings before S.D.N.Y., Mar. 4, 2004, at 40:9-16, 40:22-23 (emphasis added).

18. On March 9, 2004, Judge Griesa convened a second hearing regarding security for the judgment and made the following statement concerning Pertamina's failure to cooperate with discovery orders: "I have a way to handle their failure to cooperate. **I can simply draw an inference against them. I have a right to sanction them. I have a right to strike their contentions.**" Tr. of Proceedings before S.D.N.Y., Mar. 9, 2004, at 11:16-11:19 (emphasis added).

19. On March 23, 2004, the U.S. Court of Appeals for the Fifth Circuit issued an Opinion affirming the Southern District of Texas' confirmation of the

judgment against Pertamina. The Opinion contained the following statements:

a. Concerning Pertamina's dilatory litigation tactics:

> Pertamina appealed to this court. During the appeal, Pertamina filed in the district court a motion to set aside the judgment under Federal Rule of Civil Procedure 60(b)(2), based on newly discovered evidence Pertamina contended should have been disclosed during the arbitration.
>
> . . .
>
> **We reject Pertamina's efforts to delay or avoid enforcement of the Award as evidencing a disregard for the international commercial arbitration procedures it agreed to follow.**

Karaha Bodas Co., L.L.C. v. Pertamina, 364 F.3d 274, 282 (5th Cir. 2004).

b. Concerning Pertamina's waste of judicial resources: "[T]he **length of this opinion reflects the number of arguments Pertamina raises to evade its obligations under the Award more than the strength of those arguments.**" *Id.* at 282 n.5 (emphasis added).

20. On April 22, 2004, the Judge Griesa convened a conference in response to Pertamina's promise to pay the entire judgment in the event that the Supreme Court denied *certiorari* regarding the confirmation of the judgment. During that conference, Judge Griesa made the following statements:

a. Concerning Pertamina's responsibility to pay for KBC's legal fees given the litigation's wastefulness:

> [Y]ou can keep on litigating 'till the cows come home if you want to do it.

I think I issued this warning before. From now on – I hope I did – but **at a certain point the legal fees are going to be paid by Pertamina and possibly the Republic of the other side.** We have had enough of this.

. . .

If you want to keep on litigating and you want to have depositions and you want to increase your liability for legal fees to your own client and to the plaintiffs, you are welcome.

That should not be necessary if you have any sense at all you will face reality, and the reality is you are going to liable for that judgment unless the Supreme Court overturns it. Why don't you all face reality and not have those people board the plane? **It is a silly exercise and the silliness will be the silliness of Pertamina and the Republic and you'll pay for it.**

. . .

Look, you have the ability instantly to get the judgment secured and call off the depositions. If you don't, you are going to be paying the other side's fees.

. . .

> **I urge you to make every attempt to end this litigation because it is just going to waste – it is going to be more money out of Pertamina's pockets and I don't want that any more than you do.**

Tr. of Proceedings before S.D.N.Y., Apr. 22, 2004 ("Apr. 22 Tr.") at 5:1-7:15 (emphasis added).

b. Concerning Pertamina's promise to pay the judgment: "[T]he letter is quite straightforward in agreeing to pay the judgment in the event that obviously – obviously in the event that the Supreme Court either denies cert. or affirms the – or the Texas litigation result." Apr. 22 Tr. at 2:15-18.

c. Concerning the relationship between Pertamina and the GOI: "[L]et's face reality. **The Republic owns Pertamina**, and I'm sure there is not

one breath that is taken by Pertamina in this litigation that is not coordinated with the Republic." Apr. 22 Tr. at 3:25 - 4:1-3 (emphasis added).

21. On May 7, 2004, Judge Griesa convened a telephonic conference regarding KBC's Motion for Turnover of Retention Fees Accrued Through November 2003. During that conference, Judge Griesa made the following statements:

a. Concerning the cause of the scheduling problems with regard to the motions for turnover:

> I suppose this is a waste of time, but there is a great deal of useless litigation going on
>
> . . .
>
> But all of this, of course, is created by the fact that there is still not firm security for this judgment. To me, that is a **complete waste of litigation**.
>
> . . .

> There is plenty of money in New York. I do not understand why the judgment simply can't be firmly secured. If it goes on after this point, and I have said this before, there is a **very strong likelihood of substantial sanctions.**

Tr. of Proceedings before S.D.N.Y., May 7, 2004 ("May 7 Tr.") at 2:3-3:3 (emphasis added).

b. Concerning the misrepresentations in Pertamina's filings regarding the 2003 Retention Fee:

> **I have read through all of the papers that exist on KBC's motion about the year 2003 and the arguments, I have to tell you, on the side of Pertamina and the Republic are really just terrible. They are literally potentially, in my view, the subject of sanctions.**
>
> . . .
>
> There is no citation to anything specifying January 1, 2003 as the end of Pertamina's retention fee. There is simply **out of thin air** a statement by Sahala and Yuwono.

Now, this is not a satisfactory briefing. It is not a satisfactory presentation. It causes **a huge waste of time by the Court and by KBC**, and I am telling you that this is not the end of the subject.

. . .

All this other effort to somehow backdate that regulation is just a terrible, it's **a terrible kind of briefing**.

. . .

Now, is there any chance of **facing reality** and getting the judgment secured?

. . .

I think that the only thing to do is to secure the judgment, and if you can't secure the judgment, I assume this **useless litigation** will keep going. But I want to warn you, I will not put up with **further obfuscation** of the issues. I will not put up with it, and **there will undoubtedly have to be sanctions for the conduct that has already occurred. It's just not tolerable in a federal court.**

I have just gotten through, as I say, a presentation on the part of Pertamina and the Republic, which I feel is wholly misleading.

May 7 Tr. at 2:17-21, 5:14-20, 6:4-6, 6:12-13, 6:23-7:4, 14:18-20 (emphasis added).

c. Concerning the GOI's arguments presented during the conference: "**Again, that obscures the issues**... So I would appreciate you sticking to the issues instead of trying to shift the issue. . . . Ms. Lamm, you're too smart not to get my point, and you're not addressing the point." May 7 Tr. at 7:13-24 (emphasis added).

22. On October 5-6, 2004, Judge Griesa convened a hearing regarding KBC's Motions for Turnover. During that hearing he made the following statements:

a. Concerning Pertamina's responsibility for KBC's legal fees:

> **Pertamina will be paying the legal fees of KBC. There is no reason for this complex litigation. There is none at all.**
>
> . . .
>
> **So I'm saying that after a certain point, the legal expenses of KBC will simply be added to the judgment.** And if you want to continue, of course I'm here to continue. But you are paying all the legal costs. Your client will pay.

Tr. of Proceedings before S.D.N.Y., Oct. 5, 2004 ("Oct. 5 Tr.") at 4:1-3, 4:15-18 (emphasis added).

b. Concerning the protracted nature of the litigation:

> [T]his has been an extraordinary litigation, caused by the failure to secure the judgment and now failure to pay that judgment, two and three quarters years of the most complicated and expensive litigation one case imagine, and **it's going to draw to an end.**
>
> . . .

> This must be concluded. **It's a veritable nightmare of litigation for the last two and three quarters years. And the continuance of it is not justified.**

Oct. 5 Tr. at 10:9-24 (emphasis added).

2006

23. On January 24, 2006, the U.S. Court of Appeals for the Second Circuit convened a hearing regarding the Southern District of New York's order and judgment directing turnover to KBC. At that hearing, the Honorable Sonia Sotomayor addressed Pertamina's counsel regarding the cause of the protracted litigation:

> [Y]ou guys were taking forever to get your proof in on how to calculate the five percent, proof that I still don't understand, so I have a great deal of sympathy for the District Court's inability to decipher what your position is on that five percent. Because this case, I think, could have been settled very easily if somebody – if both of you had agreed that five percent of NOI which your contract

> said clearly, and just agree to that before the District Court. **But it was Pertamina's position that five percent didn't mean five percent somehow.**

Tr. of Proceedings before 2d Cir., Jan. 24, 2006, at 22:16-23:6 (emphasis added).

24. On February 15, 2006, Judge Griesa convened a hearing regarding KBC's request for an accounting of the funds associated with the Kakap accounts where he made the following statement concerning Pertamina's refusal to pay its debts:

> The record of Pertamina's activity in this case has not been such as to give me confidence in their desire to do anything to pay their debts. There's a large judgment against Pertamina. They should pay it, and **they have done everything to make it as difficult as possible to recover that lawful judgment.** And that is not going to continue.

Tr. of Proceedings before S.D.N.Y., Feb. 15, 2006 at 11:14-20 (emphasis added).

25. On May 8, 2006, the Southern District of New York issued an Opinion ordering Pertamina to provide an accounting of, and turn over, the Kakap funds. That Opinion states concerning Pertamina's counsel's failure to comply with discovery orders:

> **However, in response to the directive regarding documents and information backing up the figure, Sherman & Sterling basically provided nothing.** All that was provided was a one-page chart containing the figures and a covering letter from the Head of Government Executive Agency for Upstream Oil and Gas Business Acting Head Division of Financial Operation, addressed to Pertamina, forwarding a "Financial Quarterly Report." The letter essentially contains no information, nor has the Financial Quarterly Report been produced by Shearman & Sterling.
>
> . . .

> As to the production of back-up documents and other information, **there has been a complete failure of compliance by both Pertamina and Shearman & Sterling.** Shearman & Sterling attempts to excuse this by saying that the information is in the custody of an entity called BP Migas, a separate company not controlled by Pertamina. However, it is impossible to believe that Pertamina does not have documents and other information accounting for the large amounts of money owed to it and showing how those amounts were calculated. Even as to BP Migas (which was specifically named in the March 8 order), there is clearly a sufficient relationship with Pertamina so that Pertamina, and BP Migas should be able to share relevant materials and probably do so in the course of business. In response to the order, **Shearman & Sterling had an obligation to use its best efforts to obtain the documents and information from BP Migas, as well as Pertamina. There is no indication that Shearman & Sterling has done any such thing.**

Karaha Bodas Co., L.L.C. v. Pertamina, No. 21-MC-00098 (TPG), 2006 WL 1226986, at *1 (S.D.N.Y. May 8, 2006) (emphasis added).

26. On August 25, 2006, Judge Griesa convened a hearing regarding KBC's Motion for Sanctions. During that hearing, Judge Griesa made the following statements:

a. Concerning the waste of judicial resources caused by Pertamina's failure to pay the judgment:

> **I will say this, that that decision required enormous work by the court, and I regard all of that totally useless,** that effort, and I think that there is a very, very big issue about whether further resistance to the payments of this judgment after the Court of Appeals decision in the spring of 2004, whether that was totally unreasonable.
>
> . . .
>
> But I suppose that the issues raised by Cleary Gottlieb were always within the realm of reason, but the overall picture was not within the realm of reason certainly, after the [Fifth Circuit a]ffirmed the District Court judgment in Texas, **there is absolutely no grounds to continue to**

> **fight this, and there was no possibility of getting certiorari from the Supreme Court, none at all. And even after that, that Court of Appeals' affirmance by the Fifth Circuit, there was a lot of hard work in this court which was totally unnecessary, completely unnecessary,** and then to have a sanction motion with 350 pages of briefs.

Tr. of Proceedings before S.D.N.Y., Aug. 25, 2006 ("Aug. 25 Tr.") at 7:19-24, 9:3-15 (emphasis added).

b. Concerning Pertamina's tactics:

> [T]he record is very clear that **Pertamina has used every possible device to delay the payment of a just debt.**
>
> . . .
>
> I will say to Pertamina's brand new counsel, who come from a distinguished law firm, that your client in a overall picture has used the process of this court in every conceivable way to **delay and prevent KBC from recovering on a lawful obligation and a lawful judgment.**

Aug. 25 Tr. at 8:2-17 (emphasis added).

c. Concerning KBC's concern that Pertmaina might bring an action against KBC elsewhere: "[E]**ven the possibility of further useless litigation is something that I want to be warned of**, and I want to know about if it's in the offing, in view of this long record which you are aware of." Aug. 25 Tr. at 17:14-17 (emphasis added).

d. Concerning the false evidence presented by Pertamina:

> If you can get to the issue, the issue here is **falsification of facts by persons from Pertamina.**
>
> . . .
>
> Was the testimony of Mr. Na'im on April 9, 2002, page 56, was it true or untrue?
>
> . . .

It was untrue, right?

. . .

I find it impossible to believe that he was simply mistaken

. . .

To say its mistaken doesn't go far enough as to the facts.

Aug. 25 Tr. at 73:8-10, 76:18-22, 77:22-24, 78:9-10 (emphasis added).

e. Concerning Pertamina's former counsel's assertion that the false evidence was immaterial: "I hate to say something about a lawyer who is not here, but [that is an] **absolutely groundless statement**: 'We respectfully submit, however, that this information is immaterial for the purposes of this case.' ... How it could be more material I cannot conceive." Aug. 25 Tr. at 42:20-23 (emphasis added).

f. Concerning Pertamina's current counsel's explanation that Na'im's false testimony only involved one of the issues in the case: "**Does that excuse Pertamina from lying about who owned the refineries?**" Aug. 25 Tr. at 82:1-2 (emphasis added).

g. Concerning Pertamina's failure to provide the discovery requested by KBC's counsel to clarify the contradictions in the evidence presented by Pertamina:

> **Then the next problem, what Mr. Dugan did was, and he could have used a different tactic,** he could have asked for a hearing on the refineries in this court, but what he did was try to get discovery. He certainly knew there were indications that the refineries were owned by Pertamina, the agreement with the Export-Import Bank and so forth. So he tried to get those contradictions resolved, and the contradictions between some documents and the testimony of the chief financial officer. **And so he tried to get discovery, and the discovery wasn't furnished.**

Aug. 25 Tr. at 82:8-17 (emphasis added).

h. Concerning Pertamina's culpability for the false testimony: "**Pertamina was the ultimate source of the facts, and they had the responsibility to see that the court and the plaintiffs were properly informed.**" Aug. 25 Tr. at 103:18-20 (emphasis added).

i. Concerning Pertamina's mistreatment of its counsel:

> Pertamina was represented by Cleary Gottlieb . . . finally I think they had enough. I think Cleary Gottlieb resigned, or whether they resigned or were discharged it doesn't make any difference. **The record shows that Pertamina was, to use the vernacular, chiseling them on the fees**, among other things, and it was quite obvious that finally Cleary Gottlieb had enough of it; and now it's been taken over [sic] the joyful task has been taken over by Shearman & Sterling. Congratulations.

Aug. 25 Tr. at 8:18-9:2 (emphasis added).

27. On September 26, 2006, Judge Griesa convened a hearing regarding KBC's Motion for Injunction Concerning Litigation in the Cayman Islands. During that hearing, Judge Griesa made the following statements:

a. Concerning Pertamina's timing in bringing its action in the Cayman Islands:

> **And here we have on the very eve of the distribution after all these years, on the very eve we have this application to the Cayman Islands court to prevent the orderly use of the money. If that is not an interference with the jurisdiction I don't know what is.**
>
> . . .
>
> It seems to me anybody who is a lawyer or a judge, it is most unfortunate that this allegation of fraud, **which I believe was available to Pertamina a long time ago,**

> **to have now, after all the litigation that has gone on, to have a fresh lawsuit in the Cayman Islands purporting to raise these issues so that the litigation may be strung out for. . . a long further time, it is the kind thing which really the law should try to avoid. It is a terrible – it is a terrible thing.**
>
> . . .
>
> This Court will not countenance activities by Pertamina in bringing a lawsuit in the Cayman Islands to prevent KBC from having the fruiting of its judgment, will not countenance such a thing being done half a month before the likely conclusion of this case – conclusion of the relevant proceedings with the Supreme Court.

Tr. of Proceedings before S.D.N.Y., Sept. 26, 2006 ("Sept. 26 Tr.") at 27:17-21, 30:15-24. 52:23-53:3 (emphasis added).

b. Concerning his impressions of the Cayman Action:

> **[T]he record here, as far as Pertamina is concerned, in my view is just atrocious, and to come in with something which they could have come in with long ago, in the first place, the idea that this is newly discovered evidence is so suspect that I just affirmatively say that it is simply probably not true.** I'm not saying it is conclusively, but for the purpose of my ruling, **I think the probabilities are very, very strong that this is a flat misrepresentation.** So that is not a small thing.

Sept. 26 Tr. at 56:2-10 (emphasis added).

c. Concerning the impact of the Cayman action on the pending Sanctions Motion: "**[W]hat I am really looking for are lies, and there were some of those. And if that is repeated in this exercise there will be sanctions.**" Sept. 26 Tr. at 2:15-17 (emphasis added).

28. On December 8, 2006, Judge Griesa issued an Opinion enjoining Pertamina from prosecuting its

Cayman Action and initiating similar actions elsewhere.

That Opinion states:

a. Concerning Pertamina's concealment of its intention to bring the Cayman Action:

> [T]here can be no doubt about the fact that Pertamina was planning the Cayman Islands action as of August 28 and probably for a substantial period of time before that. **Also, there can be no doubt that both Pertamina and its attorneys knew full well that the Court's questions were directed to finding out whether the Supreme Court's denial of certiorari would mean final termination of all litigation,** so that KBC could be paid out of the funds restrained in New York. Obviously the Court did not know enough to ask specifically if Pertamina planned to a new action in the Cayman Islands. **But an honest look at the Court's inquiry and an honest response would have led to the disclosure of the plan to bring such an action.**
>
> There was, of course, no such disclosure. **The circumstances strongly support an inference that concealment by**

> **Pertamina was deliberate and with a purpose.**

Karaha Bodas Co., L.L.C. v. Pertamina, 465 F. Supp. 2d 283, 288-89 (S.D.N.Y. 2006) (emphasis added).

b. Regarding Pertamina's timing in bringing the Cayman Action:

> **[I]t is necessary to reckon with the tactics employed by Pertamina.**
>
> . . .
>
> **If Pertamina had the documents in March 2001, as KBC claims, it had ample time to file a motion under Rule 60(b)(3) in the Texas district court within the one year time limit.**
>
> Of course, Pertamina asserts that it did not look at the documents until August 2005, and therefore did not appreciate their significance until that time. Even if this is true, **there is surely a serious problem about Pertamina's diligence . . . In view of this campaign against KBC, it is difficult to justify Pertamina's delay of three years or more in looking at documents left in its possession by KBC.**

However, in an attempt to head off possible further problems, the Court, in August 2006, asked counsel for Pertamina whether there would be any further issue which might come up following the likely denial of certiorari by the Supreme Court. **On August 28, 2006 the attorney for Pertamina wrote the Court basically assuring the Court that a denial of certiorari by the Supreme Court would be the end, and specifically stating that Pertamina did not object to payment of the judgment.**

Counsel for Pertamina has stated to this Court that he did not know, when he wrote that letter, that Pertamina planned to file the action in the Cayman Islands. **But, of course, Pertamina knew. It deliberately concealed its plan from this Court and deliberately failed to have its attorney disclose that plan in the August 28 letter. No other conclusion is possible.**

. . .

It is significant that, on December 31, 2003, Alfred Rohimone, Pertamina's Finance Director, told the prominent Indonesian newspaper Kompas that the arbitration decision could no longer be disputed, but that **"what Pertamina is doing now is actually only buying time." Pertamina's**

> **tactics in the Cayman Islands action are completely consistent with "buying time." . . . Pertamina held back, waiting until the very last moment before the litigation was to be terminated. It concealed its strategy from this Court in response to a direct inquiry, and then filed an action in a foreign court.**

Id. at 297-98 (emphasis added).

c. Concerning the effect of the Cayman Action on the jurisdiction of the United States' courts:

> **This court has the power, and indeed the duty, to deal with the abusive litigation tactics used by a party before it . . .** Finally, at the very moment when the litigation was to be legitimately ended, **Pertamina brought the action in the Cayman Islands after engaging in literal subterfuge dealing with the Court in New York. The purpose of this lawsuit is to effectively wipe out the effect of the United States judgments and to do this with as great an amount of delay as possible.**

Id. at 300 (emphasis added).

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29. On April 30, 2007, the Southern District of New York found that Pertamina's perjurious actions during these proceedings was sanctionable, and awarded KBC $500,000 in sanctions. The decision contained the following statements:

a. Concerning Pertamina's failure to comply with discovery orders: "**Pertamina did not produce the required discovery**. . . . It is true the KBC was obliged to apply for additional discovery, and that compliance with the discovery order of the Texas court was greatly delayed." *Karaha Bodas Co., L.L.C. v. Pertamina*, No. 21-MC-00098 (TPG), 2007 WL 1284903, at **4-6 (S.D.N.Y. Apr. 30, 2007) (emphasis added).

b. Concerning the significance and intentional nature of the perjurious testimony submitted by Pertamina:

> [T]he **falsification by Na'im in his deposition was intentional and had the purpose of leading KBC and the court off the track** in seeking to apply the proceeds of the petroleum accounts to the large judgment debt. There was **no excuse for this deception, perpetrated by the Chief Financial Officer of Pertamina.** The court concludes that **the matter is serious** enough to justify the invocation of the inherent power of the court to impose sanctions.
>
> . . .
>
> **Pertamina and Na'im knew of the great significance of the issue being addressed and knew that the testimony being given had an important bearing on whether KBC would be able to recover the $261 million arbitration award,** which had then been reduced to judgment in the District Court in Texas. Since the issue was highly important, **the falsification of the testimony was grave indeed** [and] to pass the matter by without even a civil

> penalty would be, in the view of the court, a failure in the performance of the court's duty.

Id. at *6 (emphasis added).

c. On the decision to impose a monetary sanction against Pertamina:

> [T]he court is imposing sanctions against Pertamina because of the false testimony of a Pertamina official . . . the court finds that **Pertamina engaged in willful misconduct, through falsification of deposition testimony, and that this misconduct cannot be allowed to go without penalty.**
>
> . . .
>
> **[T]he falsification of Na'im was most serious [and] the court believes that the false testimony of Na'im cannot be passed without a penalty.** There should be a **substantial penalty**, . . . the court has decided to impose sanctions on Pertamina in the amount of $500,000.

Id. at **1, 6 (emphasis added).

30. On May 21, 2007, the Court of Appeals for the Second Circuit convened a hearing regarding the Southern District of New York's injunction preventing Pertamina from continuing its Cayman Action. At that hearing, the Second Circuit judges engaged in the following colloquy regarding Pertamina's misrepresentations regarding its intentions to bring the Cayman Action:

> JUDGE CABRANES: Judge Griesa asked your client shortly before the Supreme Court was to rule on your client's cert. petition whether it would agree to release to KBC the funds that the district court had ordered turned over . . . and your client, through counsel, told the district court by letter dated August 28th, 2006, that it would, quote "not object before this Court to payment of the judgment," correct?
>
> MR. SINGER: That's correct.

. . .

JUDGE CABRANES: . . . At the time that Sherman and Sterling wrote that letter, your client was planning to initiate an action in the Cayman Islands, right?

MR. SINGER: I don't believe so, Your Honor. There's no evidence in the record to show that . . .

JUDGE CABRANES: And you think – and **you're prepared to make the argument that this very clever formulation in the letter was a complete coincidence, I suppose. Quote, . . . "Pertamina would not object before this Court to payment of the judgment." By happy coincidence, that locution two weeks later becomes the basis of your argument here that there was no connection between these two, yes?**

. . .

JUDGE BERMAN: And you're telling us that your client didn't know at the time of this August 28 letter – at the time that Sherman & Sterling was writing that letter that it, Pertamina, had no intention of actually acquiescing to the district court's

judgment and letting the funds pass free and clear to KBC?

. . .

JUDGE CABRANES: **Why would anyone use this curious locution before this Court if it wasn't to try to be evasive with respect to something that would transpire later? . . . I mean wouldn't the normally English language statement that if you intended to simply acquiesce to the district court's judgment and let the funds pass free and clear to KBC, you would have said something roughly like that. You wouldn't have seized upon this clever locution "not object before this Court the payment of the judgment."**

MR. SINGER: I don't know, Your Honor.

JUDGE CABRANES: . . . **It certainly looks curious at a minimum, perhaps even apparent that Pertamina is trying to evade the jurisdiction of the district court and to effectively to be free to move this dispute to yet another forum.**

Unofficial Transcript of Proceedings, 2d Cir., May 21, 2007 at 20-29 (emphasis added).

31. On September 7, 2007, the Court of Appeals for the Second Circuit issued an opinion affirming the Southern District of New York's decision enjoining Pertamina from prosecuting its Cayman Action and initiating similar actions elsewhere. That Opinion states:

a. Concerning the protracted length of the litigation:

> We further note that the scope and duration of this litigation militate heavily in favor of a swift and definitive resolution of the dispute over the injunction.
>
> . . .
>
> [T]he Cayman Islands action follows what, by any account is, an **extraordinarily complex and protracted series of proceedings**. At oral argument, KBC informed the Court (and Pertamina did not dispute) that **Pertamina's resistance to confirmation and enforcement of the Award has required KBC to appear in**

> **more than fifteen courts in seven nations over the past nine years,** including five appearances in our Court alone, in support of its enforcement efforts.

Karaha Bodas Co., v. Pertamina, 500 F.3d 111, 120 n.12, 127 n.18 (2d Cir. 2007) (emphasis added).

b. Concerning the necessity of the injunction: "Were we to vacate the District Court's injunction, Pertamina would be free to engage in **vexatious proceedings that**, as discussed, **are intended to undermine or vitiate federal judgments.**" *Id.* at 129-30.

32. On October 9, 2007, the High Court of the Hong Kong Special Administrative Region Court of Appeal issued an opinion rejecting Pertamina's appeal of the High Court's enforcement of the Arbitral Award, which was based on allegations of fraud. That Opinion states:

a. Regarding Pertamina's strategy in bringing its new appeal:

> What Pertamina is trying to do is to put a different gloss on the same case and use the discovered documents as a pretext for another attack on the Award.
>
> . . .
>
> The assertion of fraud on the part of KBC in effect became the 'admission ticket' into what began to resemble a detailed reargument of the case and a rehearing of the very matters with which the learned arbitrators had been seized, albeit without, of course, sight of the 'new' documentation.

Decision, Civil Appeal no. 121/2003, High Court of the Hong Kong Special Administrative Region Court of Appeal (Oct. 9, 2007), at ¶¶ 80, 124.

b. Regarding the impropriety of Pertamina's appeal:

> In my view the course that this case has taken represents a **paradigm example of**

> **what should *not* occur in the context of enforcement of Convention awards,** wherein an alleged case of fraud is used as the 'hook' to reopen argument upon the entire case hitherto the subject of full arbitral consideration. In opening this appeal [Pertamina's counsel] had noted that Pertamina anxiously had been awaiting its 'day in court', but for my part I regret to say that **I consider this appeal to have been singularly lacking in merit.**

Id. at ¶142 (emphasis added).

c. Regarding the merits of Pertamina's "fraud" claims:

> **There is nothing in this complaint.**
>
> . . .
>
> **[T]his plea did not achieve the level of a "*prima facie case*", much less the standard of a "reasonable prospect of success."**
>
> . . .
>
> In the present case, for the reasons given by the Vice-President, **I do not think Pertamina comes anywhere near to**

> **establishing that the new evidence would have an important influence on the outcome of the arbitration. Further, I do not think they show any fraud practiced by KBC at the court below or for that matter, at the arbitration proceedings.**

Id. at ¶ 109, 134, 154 (emphasis added).

33. On October 11, 2007, the Grand Court of the Cayman Islands issued an opinion dismissing with prejudice Pertamina's Cayman Islands' action and awarding costs to KBC. That opinion states:

a. Regarding Pertamina's repeated attempts to delay the enforcement of the Arbitral Award:

> The disputes between [Pertamina and KBC] were the subject of a final arbitral award in favour of KBC made as long ago as December 2000. The jurisdiction governing the arbitration was Switzerland, where Pertamina's attempt to annul the award was rejected in August 2001. There has since followed over the subsequent 6

> years a plethora of litigation in various jurisdictions, including Indonesia, Hong Kong, Canada, Texas and, most relevant for this purpose, New York, in which **Pertamina has attempted by one means or another to avoid or delay enforcement of the arbitral award.**
>
> . . .
>
> It has become very clear over several years that **Pertamina has been adopting increasingly desperate tactics to avoid or delay its liability under the arbitral award.**

Decision, Cause No. 386 of 2006, Grand Court of the Cayman Islands (Oct. 11, 2007), at 5-6 (emphasis added).

b. Concerning Pertamina's purpose behind bringing the Cayman Action:

> Suffice it to say that it is clear to me that **Pertamina brought and pursued these proceedings before this Court in a further attempt, not only to avoid or delay its established liability under the arbitral award,** (which award clearly had no connection whatever with this

> jurisdiction other than the purely incidental fact that KBC is registered as a Cayman Islands company) **but also in an attempt to undermine or avoid the consequences of the judgments** of various courts worldwide and, most recently, those of the US federal courts.
>
> . . .
>
> **I am satisfied that in all the circumstances the description by the New York Court of Pertamina's proceedings before this Court as 'an abusive litigation tactic' is entirely justified.** It is clear that the proceedings amount in the circumstances to an attempt to use this Court for a collateral purpose, [namely] **an attempt to further delay and avoid the enforcement of the arbitral award made almost 7 years ago. In my view that was improper and unreasonable and as such an abuse of this Court.**

Id. at 6 (emphasis added).

c. Regarding the impropriety of the Cayman Action, the Cayman Court echoed the views of the Hong Kong Court of Appeals:

> In dismissing Pertamina's claim the Hong Kong Court of Appeal said in its judgment of 9th October 2007 "**this is a paradigm example of what should not occur in the context of enforcement of Convention awards**"; this applies in my view equally, indeed even more so, to the proceedings before this Court. **In my judgment these proceedings were improperly and unreasonably brought and maintained by Pertamina and amount to an abuse of this Court.**

Id. at 7 (emphasis added).

34. I declare under penalty of perjury that the foregoing is true and correct. Executed in New York, NY on December 10, 2007.

s/ James E. Berger

James E. Berger

Respectfully submitted,

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APPENDIX 3 — EXCERPTS OF TRANSCRIPT OF S.D.N.Y. PROCEEDINGS DATED SEPTEMBER 26, 2006

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

21 MC 98

KARAHA BODAS CO.,

Plaintiff,

v.

PERTAMINA,

Defendant.

September 26, 2006
3:45 p.m.

Before:

HON. THOMAS P. GRIESA,

District Judge

(Case called)

THE COURT: It's your motion, Mr. Dugan.

MR. DUGAN: Thank you, your Honor.

Your Honor, just to start off, I know you have heard me express my concern on previous occasions about the

veracity of statements that have been made by Pertamina to this court but I have to tell you that this latest filing by Pertamina has really outraged me. There are some statements in here that are just so wrong and so misleading to the court that I just have to bring them to the court's attention.

THE COURT: I wanted to say this: I have before me a sanctions motion which I am going over quite carefully and there was a great deal of that litigation which involved legal positions which although to a large extent they were losing positions, they certainly cannot be sanctioned. But what I am really looking for are lies, and there were some of those. And if that is repeated in this exercise there will be sanctions. I will either do it on my own or I will entertain another motion. But we are not here for a sanction motion. We are here to arrive as quickly as we can at what I really think is a remedy which is partly I believe agreed upon by Shearman & Sterling.

But before we get to that, you go ahead with your argument. It's late in the day and we don't have a lot of time.

MR. DUGAN: All right, your Honor. If I can draw your attention to page 3 of Pertamina's opposition to KBC's application for an anti-suit injunction. Pertamina states at the bottom of that page —

THE COURT: A little louder and slower.

MR. DUGAN: Certainly, page 3, the bottom of page 3. The third line from the bottom it talks about on the basis of evidence that became available only in August 2005. Now, your Honor, that goes to the crux of the evidence that is at issue in the Cayman Islands. These are documents that were turned over to Pertamina not in 2005 but at worse in 2002 and probably in 2001. And that is admitted in the exhibits that are filed with this application itself. For Pertamina to claim before this court that the evidence only became available in August 2005 is just a blatant lie. It's been known to Pertamina. They admitted they have had these documents for at least 4 years and probably 5-1/2 years. This is not recently discovered evidence.

THE COURT: When it says evidence which became available only in August 2005, what is that evidence? The evidence, I take it, is identified in the record here?

MR. DUGAN: Correct.

THE COURT: What is that evidence?

MR. DUGAN: It's the evidence filed primarily in the Panjaitan affidavit.

* * *

THE COURT:

* * *

to grant that motion this afternoon, but I'm not saying that the motion is denied. I simply reserve decision on it. What we have discussed — and this was certainly something that was at least implicitly embraced in the motion of KBC — is some more limited relief, because KBC surely did what motions generally do, ask for such other and further relief as the Court deems just and proper. Different relief does seem just and proper to the Court. What I am directing my attention to is both the request for injunctive relief in the original Writ of Summons and also the Amended Summons, which deals with what I suppose could be called the provisional relief requested in the Cayman Islands by Pertamina.

There was a request in the original summons for an injunction against any further prosecution or any proceedings directed to the enforcement of the arbitral award. It has been conceded by Pertamina, through counsel, that Pertamina is in fact not intending to ask the court in the Cayman Islands to enjoin the conclusion of the court proceedings here. Specifically, it is conceded that there is no intention to prevent the turnover of the funds to KBC in the event that certiorari is denied and the orders of this Court do in fact become final.

In other words, Shearman & Sterling, on behalf of Pertamina, has assured the Court that there is no backing away from the literal terms of Shearman & Sterling's letter of August of this year.

Now, in order to make sure that there is no misunderstanding and no mistake about that commitment, I am going to enter an order which I believe has the consent of Pertamina, and that order is that Pertamina is enjoined and prohibited from making any request to the court in the Cayman Islands to have that court enter any kind of an order or injunction which would interfere with the further processes of this court enforcing the arbitral award, including the turnover of the funds that have been restrained in the event that certiorari is denied by the Supreme Court.

I don't doubt for a minute Mr. Weisburg's assurance on behalf of Pertamina, but to prevent any misunderstanding, because there is a foreign court involved, that injunction, which I'll refer to as a consent injunction, will be entered, and that is the direction of the Court as of this moment.

Now, what is not consented to is what I want to discuss now.

The original Writ of Summons in the Cayman Islands court asked for an injunction against KBC preventing KBC from dealing with or disposing of any sums received as a consequence of the fraud, deceit and so forth, the wrongdoing alleged against KBC.

In the Amended Summons, it appears, on the basis of that Amended Summons, Pertamina will request the Court in the Cayman Islands to restrain, pending the conclusion of the trial of the action there, any disposal

of any funds received by way of the enforcement of the arbitral award. Consequently, what is going to be requested in the Cayman Islands court is an injunction against KBC directing that KBC must hold the funds turned over to it and must hold those funds for the benefit of the Cayman Island action.

It is my view that such an order would be sharply at odds with the rulings of this Court and would interfere with the carrying out of the lawful orders of this Court.

What we have is a litigation which goes back six years, starting with the arbitration, going on to the confirmation action in the federal court in Texas and going on to the Fifth Circuit and then continuing in this court. In that lengthy, arduous and expensive litigation, KBC won a valid arbitration award, won a valid judgment in its favor, in the federal court in Texas. That meant that KBC was entitled to recover on that judgment, was entitled to the money that was awarded in the arbitration award and in the judgment.

The judgment debt has been the subject of extensive proceedings in the Southern District, and what this Court has entertained is applications and proceedings by KBC to obtain the money represented by the judgment. The premise on which this Court has acted in these enforcement proceedings has been that there is a valid judgment awarding a substantial sum of money to KBC, and that means that KBC was entitled to that money.

If Pertamina had come along in the federal court in Texas, or even in this court, and made a collateral attack on the arbitration award, there would have been jurisdiction to hear that collateral attack. No such attack was made, meaning that the courts in Texas and in New York have been acting on the premise that there was a valid judgment in which KBC was entitled to the monetary proceeds of that judgment. If that were not to be the case, there was a vast waste of time in this court, aside from what went on in Texas and in the Fifth Circuit.

Now, we don't know when the Supreme Court will act on the certiorari petition, but the expectation of the lawyers is that this will occur in early October, and presumably Pertamina was apprised of that expectation and of that likelihood. About a half a month before, Pertamina brings this action in the Cayman Islands.

Now, Pertamina asserts that there is newly discovered evidence. That is hotly disputed. And I am not attempting to rule on that now; I will get to that at a later proceeding. But the indications are strong enough for me to refer to them to the effect that the evidence on which the Cayman Islands' action purports to be based was not something discovered by Pertamina somewhere close to September 15, 2006.

Apparently in a proceeding in Singapore brought by KBC, Pertamina referred to these allegations of fraud, maybe not all of them, but to the basics. KBC did not go forward with the enforcement action in Singapore,

but the important thing is Pertamina did not go forward with an affirmative claim to do what it is now attempting to do in the Cayman Islands, and that is to vitiate the arbitral award — something that could have been done in Singapore or elsewhere, the "elsewhere" being perhaps the Southern District of Texas or this court.

Under these circumstances, this Court is entirely unwilling to allow Pertamina to use the Cayman Islands court to prevent KBC from enjoying the normal fruits of recovery on its judgment.

It is the normal course of things that a judgment creditor receives the money owed on a judgment, owns that money, and can use that money. If KBC were now allowed to receive the money but were required to hold it as if there were some attachment or lien on it, this would be a drastic departure from what the courts in the United States have been contemplating for all these years and surely a departure from what this Court has been contemplating in all the very arduous activities engaged in by this court.

This Court will not countenance activities by Pertamina in bringing a lawsuit in the Cayman Islands to prevent KBC from having the fruition of its judgment, will not countenance such a thing being done about half a month before the likely conclusion of this case — conclusion of the relevant proceedings with the Supreme Court.

Consequently, in addition to the consent injunction, which I referred to earlier, this Court hereby enjoins Pertamina from seeking any order or injunction from the court in the Cayman Islands interfering with the use of the money turned over to KBC, that is, the use by KBC of such money.

I recognize full well — and I specifically asked about this — that KBC is likely to distribute that money by way of dividend to the partners in the venture. I recognize that. It is exactly what I believe should be done and make no mistake about it — I amend that. It is exactly what KBC should be free to do, and I want to be explicit about it and have no misunderstanding about it.

The orders that I am referring to are effective immediately, and I am prepared tomorrow to sign a formal order, which I assume KBC will submit on notice, but it must be on short notice. Tomorrow is Wednesday, and presumably there are some proceedings in the Cayman Islands on Thursday, and, therefore, I should sign an order tomorrow.

MR. DUGAN: We will have a draft to you tomorrow morning on notice, your Honor.

THE COURT: Thank you very much.

MR. WEISBURG: Your Honor.

THE COURT: Yes.

MR. WEISBURG: May I address two subjects—

THE COURT: Yes.

MR. WEISBURG: — as a result of those orders?

First, we think that in these circumstances KBC is obligated to post a bond. Essentially, they have obtained a preliminary injunction and a bond should therefore be required.

And we will not beat around the bush. The bond, frankly, should be in the amount of any distribution that they may receive from the Bank of America, because, again, the object here is not to prevent the turnover, we are standing by our word on that, but to prevent KBC from going out of business and becoming just a plaque on the wall and defeating any future judgment enforcement that may eventually — after proceedings in Cayman.

THE COURT: Motion denied.

MR. WEISBURG: OK. Second, your Honor, we would ask for essentially a stay pending appeal, and we obviously haven't been authorized to appeal, but that's something that will have to be considered; and we would ask for a stay in the form of an order that KBC not make the distribution they're talking about making, again so that should this Court be reversed on appeal

and the Cayman Island be permitted to consider provisional relief, that that provisional relief will be available and, again, that any judgment that may be obtained at the end of the Cayman proceedings will not go unsatisfied.

Of course, if we do appeal, we will commit to seek expedited consideration by the Second Circuit.

MR. DUGAN: May I address that, your Honor?

THE COURT: Yes.

MR. DUGAN: That would be the equivalent of giving them the prejudgment attachment. Prohibiting KBC — by staying your order until the Second Circuit decides on it could result in months and months and months of delay. We don't even have the money yet. It is just entirely inappropriate. It is entirely inappropriate to put in place any form of prejudgment attachment in aid of the Cayman proceeding in any way whatsoever.

MR. WEISBURG: Your Honor, while I'm sure the KBC would be unhappy, it is absolutely not giving us the relief that the Cayman court would possibly or has been asked to render, but would simply protect us in the event that the Second Circuit may elect to reverse. It is not depended on any action in the Cayman Islands. It would only be depended upon what the Second Circuit may decide to do.

MR. DUGAN: Your Honor, then let them convince the Second Circuit, if that is the case.

THE COURT: Well, I'll tell you what. I'm into this more than Second Circuit could be, and I think the Second Circuit would be glad for a careful ruling by me on this application for a stay.

I have to tell you, Mr. Weisburg, the record here, as far as Pertamina is concerned, in my view is just atrocious, and to come in with something which they could have come in with long ago, in the first place, the idea that this is newly discovered evidence is so suspect that I just affirmatively say it is simply probably not true. I'm not saying it is conclusively, but for the purpose of my ruling, I think the probabilities are very, very strong that this is a flat misrepresentation. So that is not a small thing.

And I want that finding to be stated, and if there is an application to the Court of Appeals on this matter, I want them to understand my finding on that.

However, there is no doubt that Pertamina has a right of appeal, and if there is a need for a certificate, I would grant it. This is an appealable question, this kind of an injunction. And what I would like to see is — I don't want to, frankly, give an inch to that, the idea of what Pertamina is seeking in the Cayman Islands. However, you're absolutely right, I'm not dealing with the Cayman Islands now, I'm dealing with the Second Circuit, and I've got to respect them and their processes.

This may be -- some people might say it is more symbolism than substance, but I cannot present the idea to the Court of Appeals, if they have this appeal, they might disagree with me and then there is no money. I would like to have you consider with your clients, I believe the money should be paid.

MR. WEISBURG: We are not disputing that, your Honor.

THE COURT: I'm saying paid to KBC. I believe that if KBC wants to give the money to the partners, they should be able to do that.

What I would like to do is to have an undertaking that in the event of a reversal, I would like to have — again, this may be more symbolism than substance, and I'm sorry, but the symbolism means something. I would like to have some assurance in some way that the money would be returned to KBC and held by KBC in the event I am reversed.

What I'm saying is KBC wants to distribute the money to Florida Power and to the other company. If those companies will invest the money but undertake to return equivalent funds in the event of a reversal, that's what I would like to suggest.

* * * *

APPENDIX 4 — EXCERPTS OF TRANSCRIPT OF S.D.N.Y. PROCEEDINGS DATED AUGUST 25, 2006

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

New York, N.Y.

21 MC 00098

KARAHA BODAS CO., LLC,

Plaintiff,

v.

"PERTAMINA," et al.,

Defendants.

Before:

HON. THOMAS P. GRIESA,

District Judge

* * *

THE COURT: That is not particularly identified with one stream versus another stream?

MR. DUGAN: It's not identified with any stream at all.

THE COURT: Just a fund.

MR. DUGAN: Just a fund, a fund to pay any amount that you conclude belongs to Pertamina, and subject to execution by KBC, and that is how it's worked since then. For example, when the Kakap $25 million, that Pertamina conceded was its own money, was identified in May of this year, that payment came out of that fund even though there was no specific identification of Kakap funds going into it. So that's how it's worked. It's the equivalent —

THE COURT: Let's suppose, let's assume that the Supreme Court denies cert. Where do we go from there?

MR. DUGAN: At that point, if the Supreme Court denies cert, which we fervently hope for, we will submit to your Honor a calculation, a final calculation of the amount of the judgment, and we will credit — we have recovered some minor amounts in Hong Kong from our enforcement efforts there, and obviously we will credit the amounts from Hong Kong to the existing amount of the unpaid judgment, and we will come up with a final figure, and we will submit and work and turn over to your Honor and ask you to —

THE COURT: I assume that the amount that is tied up will then be paid to KBC?

MR. DUGAN: That is correct.

THE COURT: And there is no further issue, right?

MR. DUGAN: There is one further issue, your Honor, and this has come up only recently, and in proceedings in Singapore, enforcement proceedings in Singapore, Pertamina alleged that KBC, back in the years 1998, 1999, 2000, perpetrated a fraud in the arbitration tribunal by withholding certain documents that Pertamina alleges are central to the resolution of the disputes in the underlying arbitration.

We believe those arguments, those allegations are wholly baseless. Nonetheless, Pertamina told the court in Singapore that if the court in Singapore issued a finding of fraud, it was going to start a new action in the United States to try to recover all the finds that had been paid, a new fraud action in the United States.

We don't know what Pertamina's intention is, but it's entirely possible, based on what Pertamina told the Singapore court, entirely possible that even if the Supreme Court denies the petition for cert. from the Second Circuit, even if that happens we may still be facing —

THE COURT: I will ask Mr. Weissburg, what about that? Is there any intention to have further litigation, or can we end it? If the Supreme Court denies cert, will the money simply be paid to KBC or not?

MR. WEISSBURG: Your Honor, I have no instructions to commence an action.

THE COURT: I think you better get instructions. I would like instructions. How soon can you get instructions?

MR. WEISSBURG: Your Honor, I am not handling the matter in Singapore. I am not aware —

THE COURT: But you are handling the matter in New York, right?

MR. WEISSBURG: I am.

THE COURT: You represent Pertamina in New York?

MR. WEISSBURG: I do, your Honor.

THE COURT: In this court, right?

MR. WEISSBURG: Absolutely.

THE COURT: I want to know the answer.

MR. WEISSBURG: I can't answer the question, your Honor.

THE COURT: When can you get an answer?

MR. WEISSBURG: I can communicate with my client. All I can tell the court is I have no instructions and I am not prepared —

THE COURT: I would like an answer by tomorrow, by Monday.

MR. WEISSBURG: May I know exactly what the question is, your Honor?

THE COURT: The question is, and I have absolutely a good reason for asking such a question in view of the record here, I want to know, assuming that the Supreme Court denies cert., I want to know if Pertamina will now agree to the payment of the judgment, which would mean the release of the funds which are now held to secure that judgment, immediate release.

MR. WEISSBURG: I will present that question to my client and get an answer to the court and Mr. Dugan as soon as I have the answer.

THE COURT: Monday.

MR. WEISSBURG: I will communicate as best I can, your Honor, I will emphasize the urgency of your Honor's instructions.

THE COURT: Right, because even the possibility of further useless litigation is something that I want to be warned of, and I want to know about if it's in the offing, in view of this long record which you are aware of.

MR. WEISSBURG: I understand.

THE COURT: So please have that answer by Monday.

MR. WEISSBURG: I will do my absolute best to have an answer.

THE COURT: All right.

* * * *

APPENDIX 5 — LETTER FROM HENRY WEISBURG OF SHEARMAN & STERLING LLP TO HONORABLE THOMAS P. GRIESA DATED AUGUST 28, 2006

SHEARMAN & STERLING LLP

hweisburg@shearman.com
212-848-4193

August 28, 2006

By Fax and Hand

Hon. Thomas P. Griesa
United States District Court
Southern District of New York
500 Pearl Street
New York, New York 10007

Karaha Bodas Company LLC v. Pertamina
(No. 21-MC-00098)

Dear Judge Griesa:

Pursuant to the Court's direction, we are writing to address the question posed by the Court at last Friday's hearing with respect to the payment of the outstanding portion of KBC's judgment by Pertamina. Our understanding of Your Honor's question is whether, in the event that the Supreme Court denies the petitions for certiorari filed by Pertamina and the Ministry of Finance of the Republic of Indonesia, Pertamina will agree to the payment of KBC's judgment. We have been instructed by Pertamina to inform the Court and counsel for KBC that, in the event that the Supreme Court denies

the pending petitions, and assuming that the Court issues a turnover order with respect to the restrained funds appropriate in form and amount, Pertamina will not object before this Court to the payment of the judgment.

Respectfully submitted,

s/ Henry Weisburg
Henry Weisburg

cc: Christopher F. Dugan, Esq. (by fax and mail)
James Berger, Esq. (by fax and mail)
Carolyn B. Lamm, Esq. (by fax and mail)

APPENDIX 6 — LETTER FROM MATTHEW D. SLATER OF CLEARY, GOTTLIEB, ET AL, TO HONORABLE THOMAS P. GRIESA DATED APRIL 19, 2004

CLEARY, GOTTLIEB, STEEN & HAMILTON
2000 Pennsylvania Avenue, N.W.
Washington, D.C. 20006-1801
(202) 974-1500

April 19, 2004

VIA FACSIMILE

Hon. Thomas P. Griesa
United States District Court for
the Southern District of New York
500 Pearl Street, Courtroom 26B
New York, New York 10007

Re: Karaha Bodas Company, L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara ("Pertamina"), No. 21-MC-00098

Dear Judge Griesa:

I am writing to report on developments relating to the matters discussed during the telephone status conference conducted on April 12, in particular in relation to the Court's request that Pertamina confirm its readiness to pay the judgment in this case.

As I have previously stated in open court, it is Pertamina's policy to observe its legal obligations and international commitments. Its preferred method of dispute resolution is amicable agreement, and it continues to seek a negotiated settlement in this case. Although it believes that the arbitration award is deeply and fundamentally flawed (and an Indonesian court has so held) and that all or most of the funds in the restrained accounts belong to the Ministry, it is mindful that the courts in the United States and Hong Kong thus far have concluded that the award may be enforced, and Pertamina has given careful consideration to this Court's questions about Pertamina's intentions as to payment.

I am pleased to report, therefore, that I am now authorized by Pertamina to advise the Court that Pertamina commits to pay the Texas Judgment in the event that its forthcoming petition for writ of certiorari concerning the Fifth Circuit's decision is denied or otherwise unsuccessful. In return, Pertamina expects that KBC will agree to suspend proceedings concerning the arbitration award in other jurisdictions and, upon payment, that KBC would dismiss all such proceedings with prejudice. Pertamina's commitment is without prejudice to its firm position as to the flaws in the arbitration award and as to ownership of the restrained funds, but rather is undertaken to bring this dispute to a conclusion upon a final and unreviewable determination that the arbitration award is enforceable in the United States.

Based on Pertamina's commitment to pay the judgment without regard to ownership of the funds subject to restraint, the litigation before this Court can be suspended, and there is no need for the Rule 30(b)(6) deposition, as both the Court and KBC acknowledged during the April 12 conference. Accordingly, we respectfully request that the Court vacate or stay its discovery order entered April 15, 2004.

Respectfully,

s/ Matthew D. Slater
Matthew D. Slater

cc: Christopher F. Dugan
Carolyn B. Lamm

APPENDIX 7 — EXCERPTS OF TRANSCRIPT OF S.D.N.Y. PROCEEDINGS DATED OCTOBER 5, 2004

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

21 MC 98 (TPG)

KARAHA BODAS CO., L. L. C.,

Plaintiff,

v.

PERUSAHAAN PERTAMBANGAN MINYAK DAN GAS BUMI NEGARA (Pertamina),

Defendant.

October 5, 2004
10:10 a.m.

Before:

HON. THOMAS P. GRIESA

District Judge

THE CLERK: In the matter of an arbitration between Karaha Bodas Company v. Pertamina.

THE COURT: We are here to deal with the so-called unadjudicated accounts?

MR. DUGAN: Your Honor, there has been a significant development in the case that I would like to go to first if I could.

THE COURT: Yes.

MR. DUGAN: If you recall, last spring, Pertamina made a commitment to pay the entire judgment if certiorari to the supreme court from the Fifth Circuit with regard to the underlying arbitration award was denied. Yesterday, certiorari was denied. And they made this commitment to end this litigation upon that event happening. And we would like to hold Pertamina to that commitment, to that promise, and see if they can be persuaded to release the funds that are held in New York today, so that we can end this hearing. They made a firm commitment. I would like to, if I could, just bring the letter to your attention in which they made this firm commitment. We believe they should be bound to that commitment and they should end this case today.

THE COURT: I agree. What about it?

MR. SLATER: Your Honor, Matthew Slater for Pertamina. I regret that unfortunately I cannot effectuate that today and I cannot rely on the letter that —

THE COURT: Did you find out that cert was denied?

MR. SLATER: Yes.

THE COURT: Did you communicate with your client?

MR. SLATER: With one of the representatives of the client, yes, your Honor.

THE COURT: And did you ask them about your commitment?

MR. SLATER: I've been inquiring about this commitment, your Honor, for a number of weeks, because there have been statements made in the press of which Mr. Dugan is aware and has inquired into as well to the effect that Pertamina is not able to follow through on this.

THE COURT: It is certainly able because there is money in New York held.

MR. SLATER: Your Honor, may I explain what Pertamina has explained to me? There have been other developments in Indonesia with respect to the criminal investigation that has taken place with respect —

THE COURT: There is a lawful judgment which is final. There is an indebtedness. It is open and shut. And there was a commitment.

* * * *

APPENDIX 8 — EXCERPTS OF UNOFFICIAL TRANSCRIPT OF SECOND CIRCUIT PROCEEDINGS DATED MAY 21, 2007

* * *

JUDGE CABRANES: Well, if it is, I just want to place everyone on notice that the clerk's office of the Court of Appeals should be advised that it is related to this case and, therefore, that any appeal of that order would go to this panel, and we'd want to know about that as soon as it happens so that an appropriate scheduling order can be set forth in it so that we can act in some way that's compatible with whatever is happening in this case. I hope that's understood by all concerned. It is so ordered. Let me pursue this matter again of the district court order or the antecedent events, because it is part of this case. It antedates the Court's order which is at issue here. Judge Griesa asked your client shortly before the Supreme Court was to rule on your client's cert petition whether it would agree to release to KBC the funds that the district court had ordered turned over, right?

MR. SINGER: I believe that's —

JUDGE CABRANES: Judge Griesa asked that question, and your client, through counsel, told the district court by letter dated August 28th, 2006, that it would, quote, "not object before this Court to payment of the judgment," correct?

MR. SINGER: That's correct.

JUDGE CABRANES: You didn't write that letter?

MR. SINGER: I didn't.

JUDGE CABRANES: Your firm was not then representing Pertamina?

MR. SINGER: That's correct. We've become involved for the appeal.

JUDGE CABRANES: Counsel at that time was Shearman & Sterling?

MR. SINGER: That's correct.

JUDGE CABRANES: Are counsel for Shearman and Sterling present in this room?

MR. SINGER: Yes, Your Honor.

JUDGE CABRANES: Maybe we could have — could you identify them for the proverbial record?

MR. SINGER: Your Honor, Mr. Weisberg is here.

JUDGE CABRANES: All right. So it was he who wrote that letter, right?

MR. SINGER: Yes, Your Honor, but I'm certainly prepared to discuss it and address it.

JUDGE CABRANES: Yes. Well, we want you to discuss it. At the time that Shearman and Sterling wrote that letter, your client was planning to initiate an action in the Cayman Islands, right?

MR. SINGER: I don't believe so, Your Honor. There's no evidence in the record to show that. The only evidence in the record that the judge below relied upon, to my knowledge, is the timing of the events. The letter came on August the 28th. The Cayman Islands action was filed over two weeks later, on September the 16th — September the 15th. Complaints have certainly been drafted more quickly than that, and there was no evidence to suggest —

JUDGE CABRANES: Well, you could draft them right away, but you usually give it more consideration those two weeks embracing the Labor Day Weekend, you know?

MR. SINGER: Sometimes yes, sometimes no, Your Honor.

JUDGE CABRANES: Sometimes no?

MR. SINGER: But there's nothing in the record to support the assertion that Pertamina was planning a Cayman action, knew that it would bring a Cayman action as of August 18th. And the letter doesn't state one way or the other whether a Cayman action would be brought. What it says is —

JUDGE CABRANES: And you think — and you're prepared to make the argument that this very clever formulation in the letter was a complete coincidence, I suppose. Quote, "not a — it would not object — Pertamina would not object before this Court to payment of the judgment." By happy coincidence, that locution two weeks later becomes the basis of your argument here that there was no connection between these two, yes?

MR. SINGER: Your Honor, Pertamina didn't apply in any court for relief from payment of the judgment. What Pertamina asked for in the Cayman Islands was a mareva injunction —

JUDGE BERMAN: Was what?

MR. SINGER: Was a so-called "mareva" injunction —

JUDGE BERMAN: Yes.

MR. SINGER: — asking KBC to hold the money once it was paid to it. So Pertamina paid the judgment to KBC. The Cayman action was an attempt to get KBC to keep the money to secure it for a potential judgment in the Cayman actions, which is a common device in foreign courts. It's not so common in the United States, but it's not uncommon in the Cayman Islands.

JUDGE BERMAN: And you're telling us that your client didn't know at the time of this August 28 letter — at the time that Shearman & Sterling was writing that

letter that it, Pertamina, had no intention of actually acquiescing to the district court's judgment and letting the funds pass free and clear to KBC?

MR. SINGER: I'm not sure, Your Honor, sitting here today what Pertamina knew. I'm not representing that to the Court. What I am saying to the Court —

JUDGE CABRANES: What was the date of your engagement?

MR. SINGER: On this appeal we were engaged —

JUDGE CABRANES: Well, by Pertamina with respect to this, quote, "matter," unquote.

MR. SINGER: It was sometime last year. I don't know the exact date.

JUDGE CABRANES: Well, maybe you can let us know in due course by letter. Just file with the clerk's office. Give us the date of your engagement.

MR. SINGER: Of our engagement by Pertamina.

JUDGE CABRANES: Right, by Pertamina.

MR. SINGER: I mean, Your Honor —

JUDGE CABRANES: I mean because obviously —

MR. SINGER: — I can tell you Your Honor — if this is the gist of the question, I can tell the Court that it was — I mean it would have been prior to August 28th.

JUDGE CABRANES: Prior to August 28?

MR. SINGER: Yes.

JUDGE CABRANES: Well, it'd be nice to have it on the record exactly when. So prior to August 28, you consulted with Sherman & Sterling with respect to the preparation of this letter?

MR. SINGER: No, Your Honor, we had nothing to do with the preparation of this letter. We were — were not consulted about the letter.

JUDGE CABRANES: It just happened. Even though you're involved in this, quote, "matter," unquote, there are lawsuits all over the place, this is the most important one because this is where all the money is at this point, and you weren't consulted?

MR. SINGER: We were not, Your Honor, I can assure you.

JUDGE CABRANES: And when did you learn about it?

MR. SINGER: I learned about it sometime after the letter was sent. I was not counsel of record in district court.

JUDGE CABRANES: No. I understand.

MR. SINGER: I did not participate in the district court proceedings.

JUDGE CABRANES: No. I'm asking. I'm just trying to get — I'm just trying to understand since there are two law firms here and so whatever fault, if there is fault, in the preparation of this very clever letter of August 28th would lie elsewhere than Williams & Connolly?

MR. SINGER: Your Honor, I don't believe it lies with any lawyer for Pertamina. Mr. Weisburg represented to the district court, and it's on page that he did not know that a Cayman action or any action was planned at the time that he wrote the letter. So I don't think the letter can be blamed on Shearman & Sterling. I don't think the letter —

JUDGE CABRANES: Why would anyone use this curious locution before this Court if i wasn't to try to be evasive with respect to something that would transpire later?

MR. SINGER: Your Honor, the question from the Court, I believe that Mr. Weisburg asked the Court to clarify, and it's in the transcript that Mr. Weisburg asked the Court to clarify exactly —

JUDGE CABRANES: I mean wouldn't the normally English language statement that if you

intended to simply acquiesce to the district court's judgment and let the funds pass free and clear to KBC, you would have said something roughly like that. You wouldn't have seized upon this clever locution "not object before this Court the payment of the judgment."

MR. SINGER: I don't know, Your Honor.

JUDGE CABRANES: You don't know that. I don't know. It certainly looks curious at a minimum, perhaps even apparent that Pertamina is trying to evade the jurisdiction of the district court and to effectively to be free to move this dispute to yet another forum.

* * * *

APPENDIX 9 — DECISION FROM THE GRAND COURT OF THE CAYMAN ISLANDS MADE ON OCTOBER 11, 2007

IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO. 386 OF 2006

BETWEEN:

PT PERTAMINA (PERSERO)

Plaintiff

AND

KARAHA BODAS COMPANY, LLC

Defendant

Foster J.

Note re Orders made on 11th October 2007

This a brief note concerning the orders I am about to make for the assistance of counsel. It is not and is not intended to be a fully reasoned judgment and should not be treated as such.

There are two applications before me. An application by the plaintiff (Pertamina) to dismiss this action "with prejudice" pursuant to an order and judgment of the US District Court for the Southern District of New York ("the US District Court"), as affirmed by the US Court

of Appeals for the Second Circuit ("the US Court of Appeals"). Secondly, the defendant (KBC) has applied for an order for its costs of the action on the indemnity basis.

Pertamina's application to dismiss the action was not opposed. However, the expression "with prejudice" is not a term of art in this Court and is not used in Cayman Islands law, practice or procedure. However, the parties both submitted that the expression is intended to mean that the action should be dismissed on terms that the plaintiff is prohibited from bringing fresh proceedings against the defendant in relation to the same matters. Pertamina's counsel, however, informed me that Pertamina is appealing against the order of the US Court of Appeals to the US Supreme Court and that accordingly it was possible that the present US Court orders requiring Pertamina to dismiss this action could be overturned. Counsel for KBC was not aware whether a substantive appeal to the US Supreme Court had been filed, although he was aware, as appears in the materials before me at this hearing, that Pertamina had made an application to the US Supreme Court for a stay of the order of the US Court of Appeals pending an appeal, which had been rejected by the US Supreme Court.

In the circumstances, I will order that the action be dismissed on terms that Pertamina is prohibited from bringing any further or other proceedings against KBC in this Court based on the same or substantially the same causes of action or seeking the same or substantially the same relief without the leave of this Court.

This leaves the issue of costs. In circumstances where a plaintiff voluntarily discontinues its action, as is the case here, the defendant would usually have its costs of the action and I will so order in this case. The issue remains as to the basis on which those costs should be taxed and KBC seeks an order that its costs of the action should be taxed on the indemnity basis pursuant to GCR 0.62, r.4(11) (r.4(11)). That provides that the court "may make an inter parties order for costs to be taxed on the indemnity basis only if it is satisfied that the paying party has conducted the proceedings, or that part of the proceedings to which the order relates, improperly, unreasonably or negligently".

KBC submitted that in the circumstances here and the background as set out in the judgments of the US District Court and the subsequent judgment of the US Court of Appeals, as well as in the recent judgment of the Court of Appeal of Hong Kong, and in the affidavits of Christopher Dugan, Christopher Easdon (two affidavits) and the relevant exhibits (all of which I have read), this was clearly a case in which in bringing and pursuing these proceedings Pertamina acted improperly and unreasonably (the parties agreed that there was no question in this case of negligence). Counsel for Pertamina submitted that the Court may only make such an order for indemnity costs if it is satisfied that Pertamina "has conducted the proceedings" improperly or unreasonably and that there was nothing improper or unreasonable in the way in which the proceedings had been conducted after they had been initiated. He argued that "conducting the proceedings" necessarily meant

that the proceedings had already commenced and that r.4(11) therefore did not contemplate impropriety or unreasonableness in initiating the proceedings but only in their conduct after they had been initiated; once they had become "proceedings".

I was informed that there is no authority on the interpretation of r.4(11) and there is no equivalent provision in the 1999 RSC. The nearest equivalent is GCR 0.62,r.11 which provides for wasted costs orders. However, r.4(11) is not concerned with wasted costs orders; it relates to inter partes costs. It specifically refers to how "the paying party" has conducted the proceedings. In this case the paying party will be Pertamina.

I was also referred to the provisions of the English CPR part 44 as quoted in *Reid Minty v. Taylor* [2002] 2 All ER 150. However, the procedure under the CPR is very different, particularly in relation to the pre-action protocols which they require, which have no equivalent in the GCR. In the circumstances I do not think that reference to the CPR is of much assistance in the interpretation of r.4(11).

In my judgment the interpretation of r.4(11) contended for on behalf of Pertamina is too narrow. The rule refers to the conduct of the proceedings by the paying party and in my view the conduct of the proceedings is a wide enough expression to encompass the steps taken by the party to initiate the proceedings, whether by the issue of a writ or other originating process. In my view an

inter partes award of the costs of the action means the legal costs incurred by the party in whose favour the award is made to his legal counsel (subject to taxation) in respect of the work involved in taking the steps instructed by the party to process the proceedings from start to finish. An award of the costs of an action to a plaintiff would normally include the costs incurred by the plaintiff party to his legal counsel in procuring the issue of the writ by which the proceedings were commenced. Such steps seem to me to be integral to the party's conduct of the proceedings. In my judgment the phrase "conducted the proceedings" in r.4(11) is wide enough to and does encompass the steps taken by the paying party to commence the proceedings by the issue of originating process and it would be surprising if it did not. In my opinion so procuring the commencement of these proceedings was part of its conduct of the proceedings by Pertamina.

Even if I am wrong about that, it seems to me that instructing the subsequent amendment of its writ and the filing and service of a 32 page statement of claim setting out in detail the alleged basis for its purported claims were undoubtedly steps in the conduct of the proceedings by Pertamina. Accordingly, if I am satisfied that Pertamina's conduct in procuring the issue of the writ on 15th September 2006 and in instructing the subsequent filing of its amended writ and its statement of claim was improper or unreasonable in the circumstances, I may in my discretion make an order that KBC's costs of the action be taxed on the indemnity basis.

The background to those proceedings is an arbitration between Pertamina and KBC arising from certain agreements concerning exploitation of geo-thermal energy resources in Indonesia. The disputes between them were the subject of a final arbitral award in favour of KBC made as long ago as December 2000. The jurisdiction governing the arbitration was Switzerland, where Pertamina's attempt to annul the award was rejected in August 2001. There has since followed over the subsequent 6 years a plethora of litigation in various jurisdictions, including Indonesia, Hong Kong, Canada, Texas and, most relevant for this purpose, New York, in which Pertamina has attempted by one means or another to avoid or delay due enforcement of the arbitral award. The courts of New York have been dealing with such enforcement issues since 2004 because Pertamina has or had substantial funds in certain New York banks.

It has become very clear over several years that Pertamina has been adopting increasingly desperate tactics to avoid or delay its liability under the arbitral award. It is not necessary for me on this application to rehearse the history of this which is fully set out and commented on, in particular in the judgments of the US District Court and of the US Court of Appeals as well as the most recent judgment of the Court of Appeal of Hong Kong and the various affidavits, all of which are before me. Suffice it to say that it is clear to me that Pertamina brought and pursued these proceedings before this Court in a further attempt, not only to avoid or delay its established liability under the arbitral award, (which award clearly had no connection whatever with this

jurisdiction other than the purely incidental fact that KBC is registered as a Cayman Islands company) but also in an attempt to undermine or avoid the consequences of the judgments of various courts worldwide and, most recently, those of the US Federal courts. Pertamina has actively participated in the litigation resulting in all these judgments.

In the proceedings before this Court Pertamina tried, not very subtly it has to said, to seek new relief as a basis for its avoidance tactics namely by claiming damages from KBC in the amount of the arbitral award based on alleged fraud. The same, or at least a very similar, allegation of fraud was also made by Pertamina in the Hong Kong proceedings and has now been very forcefully rejected in critical terms by the Hong Kong Court of Appeal.

For the reasons set out in the US judgments in particular (and most recently in the judgment of the Hong Kong Court of Appeal) I am satisfied that in all the circumstances the description by the New York Court of Pertamina's proceedings before this Court as "an abusive litigation tactic" is entirely justified. It is clear that the proceedings amount in the circumstances to an attempt to use this Court for a collateral purpose, normally an attempt to further delay and avoid the enforcement of the arbitral award made almost 7 years ago. In my view that was improper and unreasonable such an abuse of this Court.

I should add that the public policy of New York referred to in the judgments of the New York Courts of upholding the ultimate purpose and intent behind the New York Convention on the Enforcement of Arbitral Awards is, in my view, also the public policy of the Cayman Islands. The Cayman Islands are a party to the New York Convention and have domestic legislation giving effect to it. It seems to me important that this jurisdiction, particularly as an international financial centre, should have that very same public policy and that this Court should not allow itself to be used for an improper attempt to frustrate the enforcement of a Convention arbitral award with a history like this one. In dismissing Pertamina's claim the Hong Kong Court of Appeal said in its judgment of 9th October 2007 "this is a paradigm example of what should not occur in the context of enforcement of Convention awards"; this applies in my view equally, indeed even more so, to the proceedings before this Court. In my judgment these proceedings were improperly and unreasonably brought and maintained by Pertamina and amount to an abuse of this Court.

Having regard to all the circumstances I order that KBC should have its costs of the action to be taxed, if not agreed, on the indemnity basis.

AJEF

APPENDIX 10 — EXCERPTS OF DECISION OF THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION, COURT OF APPEAL DATED OCTOBER 9, 2007

IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF APPEAL

CIVIL APPEAL NO. 121 OF 2003

(ON APPEAL FROM HCCT NO. 28 OF 2002)

IN THE MATTER OF THE ARBITRATION ORDINANCE (CAP.341)

and

IN THE MATTER OF AN ARBITRATION AWARD DATED 18 DECEMBER 2000 MADE IN AN ARBITRATION

BETWEEN

KARAHA BODAS COMPANY LLC

Plaintiff

and

PERSUSAHAAN PERTAMBANGAN MINYDAK DAN GAS BUMI NEGARA (otherwise known as PERTAMINA)

Defendant

Before: Hon Tang VP, Stone J and Lam J in Court

Dates of Hearing: 11-13 September 2007

Date of Judgment: 9 October 2007

JUDGMENT

130. If and in so far as fraud is to be asserted in this context, in my judgment the allegation should not only be specifically identified/particularized, in accordance with accepted principle, but that the allegation should emerge from the papers with a degree of clarity such that, if not actually 'leaping off the page', nevertheless the court should be left in little doubt, on the evidence placed before it, that there is a cogent and realistic case of fraud which requires to be ventilated and met.

131. In this context Mr Yu SC did, I think, accept in the course of debate between Bench and Bar that he would be equally happy with the *Saudi Eagle* rubric of "a real prospect of success", and in this I respectfully agree with the view of Tang VP that this is the criterion which should be applied in this context.

132. In my judgment this is the minimum standard so required, and unless it can responsibly be asserted by counsel that an allegation of fraud can be demonstrated to this level, it should not be canvassed or otherwise raised before the Hong Kong court in an effort to prevent enforcement of a Convention award.

133. Which brings me to the second question: on the present evidence before this court, was the appellant able to satisfy the court to the requisite level?

134. In this I entirely agree with the conclusion of the Vice-President; so far as I was concerned the material variously prayed in aid in support of this plea did not achieve the level of a '*prima facie* case', much less the standard of a 'reasonable prospect of success'.

135. In order to advance his argument, Mr Yu SC was constrained to delve into the minutiae of the case, via the recently discovered documentation, and to attempt to demonstrate, by means of inference and circumstantial extrapolation, that officers of KBC had been guilty of *suppressio veri*, and that they had knowingly and dishonestly had failed to reveal their true belief in the existence of the projected geothermal resources.

136. To say that he manifestly failed in this endeavour is not to be critical of his efforts so to persuade; it is perhaps fair to say that it was only Mr Yu's considerable forensic skill that was able to invest this argument with any degree of respectability.

137. For my part he did not come close to establishing the element of dishonesty inherent in the allegation of fraud, nor did I think that the main document upon which ultimately reliance was placed, namely, the December NORC - which, as Mr Jat SC for the respondent pointed out, itself was an extensive (106 page) document which on its face indicated the methodology which was being

adopted, and indicating the uncertainties of the volumetric method, with a whole section (Chapter 6) outlining the uncertainties of this method - was of assistance in terms of the case which was sought to be made out on behalf of Pertamina.

138. In the circumstances I consider that there was ample justification in Mr Jat's further observation that, in addition to the December NORC, the same material was set out in the December NOID, and that in the circumstances the fraud advanced was "the most peculiar fraud" he could imagine, given that it was unclear what his client had suppressed: "We gave them all the data. We told them different methods. On his case, we even told them the criteria . . ."

139. Looking at the case in the round, therefore, as far as I was concerned the fraud allegation as mooted did not get off the ground, and, in company with the Vice-President, I did not consider that the alleged alteration in approach on the part of KBC, as evidenced in the December NORC and NOID, was fraudulent or could be categorized as an intention to mislead. Nor did it avail Mr Yu alternatively to couch his criticism in terms of alleged disingenuity or impropriety or dubious business morality on the part of KBC: either the conduct complained of was fraudulent - which was the case the plaintiff came to meet - or it was not, and in this case he simply was unable to hit his desired target.

140. The issue of fraud undoubtedly constituted the main bridgehead of this appeal. In terms of the other

subsidiary issues raised by Mr Yu SC - the issue of the alleged arbitrariness of the damages award, the allegation that the tribunal had 'rewritten' the contract, and the procedural complaint in terms of the failure of the tribunal to grant an adjournment or discovery - I also agree with the analysis of the Vice-President, and am of the view that there is nothing in any of these points which would justify the court in declining to enforce this arbitral award.

141. I note that of these subsidiary points, only the alleged procedural impropriety on the part of the Tribunal was a point ventilated before Burrell J, whose judgment upon the issue was, if I may say so, impeccable.

142. In my view the course that this case has taken represents a paradigm example of what should *not* occur in the context of enforcement of Convention awards, wherein an alleged case of fraud is used as the 'hook' to reopen argument upon the entire case hitherto the subject of full arbitral consideration. In opening this appeal Mr Yu had noted that Pertamina anxiously had been awaiting its 'day in court', but for my part I regret to say that I consider this appeal to have been singularly lacking in merit.

Hon Lam J:

143. I have the advantage of reading the judgments of the Vice-President and Stone J in draft. I respectfully agree with them and for the reasons given therein, the

appeal must fail. I only wish to highlight that this is an appeal from a decision to enforce an international arbitral award. The Vice-President and Stone J have discussed at length the benchmark required for resisting enforcement on the ground of fraud. I agree with them that the *Saudi Eagle* threshold must be satisfied before the enforcing court should pay any heed to such contention. Once the threshold is satisfied, the enforcing court will probably have to hear the evidence on the allegation of fraud and make findings on the same. Whether the award should be enforced will then depend upon such findings.

144. That is the position regarding an allegation of fraud being raised at the first instance court when a respondent seeks to resist the enforcement of an international arbitral award.

* * *

152. In these cases, the fraud in question was fraud in terms of false evidence adduced at the court below. In contrast, in this appeal, the alleged fraud was fraud practiced on Pertamina when the December NOID and NORC were issued.

153. What can be derived from these cases is that when there is clear evidence of a judgment being obtained by fraud (in that conditions 2 and 3 of *Ladd v Marshall* are met), the court will apply condition 1 with flexibility to avoid any miscarriage of justice. An allegation of fraud *per se* is neither here nor there, much depends on the strength of the case as to fraud and its relevance.

154. In the present case, for the reasons given by the Vice-President, I do not think Pertamina comes anywhere near to establishing that the new evidence would have an important influence on the outcome of the arbitration. Further, I do not think they show any fraud practised by KBC at the court below or for that matter, at the arbitration proceedings.

* * * *